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162 U.S. 184

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 832.

THE INTERSTATE COMMERCE COMMISSION, APPELLANT,

vs.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY ET AL.

CROSS-APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED OCTOBER 26, 1894.

(15716.)

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1 *Assignment of errors.*

In the United States circuit court of appeals for the fifth circuit, November term, 1893.

THE INTERSTATE COMMERCE COMMISSION, complainant, *vs.* THE CINCINNATI, NEW ORLEANS AND TEXAS Pacific Railway Company, The Western and Atlantic Railroad Company, The Louisville and Nashville Railroad Company, and The Central Railroad and Banking Company of Georgia, said two last-named companies being sued by the name of The Georgia Railroad Company, defendants.	No. 178.

Now, on the eighth day of October, in the year of our Lord eighteen hundred and ninety-four, comes The Interstate Commerce Commission, by N. J. Hammond, their solicitor, and says that in the decree rendered by the United States circuit court of appeals for the fifth circuit, at New Orleans, in the State of Louisiana, on the 29th of May, 1894, in the above-entitled cause, and in the record and proceedings in said cause in said court, there is manifest error, in this, to wit:

I.

That said circuit court of appeals erred in not holding that in point of law the said The Interstate Commerce Commission had power to fix the maximum rate which it did fix as shown by the record.

II.

That said circuit court of appeals erred in not holding that the evidence justified the rate fixed by said Interstate Commerce Commission, and in not decreeing accordingly.

III.

That said circuit court of appeals erred in not reversing the judgment of the circuit court on the subject of the rates so fixed, and in not
2 sustaining the judgment and order of said Interstate Commerce Commission with respect to said rates.

Wherefore the above-named The Interstate Commerce Commission prays that said decree of the said United States circuit court of appeals for the fifth circuit be reversed, and that said court be ordered to enter a decree reversing the judgment rendered on the 5th day of June, 1893, in the above-entitled cause by said circuit court of the United States for the northern district of Georgia, so far as said decree is inconsistent with the complaints herein made.

(Signed) GEO. F. EDMUNDS &
N. J. HAMMOND,
Solicitors for The Interstate Commerce Commission.

(Filed Oct. 8, 1894.)

Cross-appeal bond.

In the United States circuit court of appeals for the fifth circuit, November term, 1893.

THE INTERSTATE COMMERCE COMMISSION, cross-appellant,
vs.
THE CINCINNATI, NEW ORLEANS AND TEXAS Pacific Railway Company, The Western and Atlantic Railroad Company, The Louisville and Nashville Railroad Company, and The Central Railroad and Banking Company of Georgia, said two last-named companies being sued by the name of The Georgia Railroad Company, cross-appellees.

Know all men by these presents that we, The Interstate Commerce Commission, are held and firmly bound unto the above-named defendants in the sum of one thousand ($1,000.00) dollars to be paid to them; for the payment of which, well and truly to be made, the said Interstate Commerce Commission binds itself and its successors firmly by these presents.

Sealed and dated this, the 8th day of October, 1894.

3 Whereas the above-named The Interstate Commission, having brought suit against said defendants in the United States circuit court of appeals for the fifth circuit to the November term, 1893, and said defendants having prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the United States circuit of appeals for the fifth circuit;

And whereas The Interstate Commerce Commission, appellee, has petitioned for a cross-appeal, and the same has been allowed:

Now, therefore, the condition of this obligation is such that if the above-named The Interstate Commerce Commission shall prosecute its said cross-appeal to effect and answer all damages and costs if it fails to make said cross-appeal good, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

(Signed) THE INTERSTATE COMMERCE COMMISSION, [SEAL.]
By N. J. HAMMOND, *its Solicitor.*

Bond accepted.
(Signed) DON A. PARDEE,
Circuit Judge.

(Filed Oct. 8, 1894.)

Supreme Court of the United States.

THE CINCINNATI, NEW ORLEANS AND TEXAS Pacific Railway Company et al., appellants,
vs.
THE INTERSTATE COMMERCE COMMISSION.
No. 729. Oct. Term, 1894.

4 To the Hon. GEORGE F. EDMUNDS and N. J. HAMMOND,
Counsel for Appellee:

Said railway companies, appellants, having appealed said cause from the circuit court of appeals for the 5th circuit to the Supreme Court of

the United States, and it being desirable that certain questions not made by the appellants shall be passed upon by the Supreme Court, you are hereby directed to file a cross appeal to the United States Supreme Court in said cause.

Washington, D. C., Oct. 2, 1894.

(Signed) RICHARD OLNEY,
Attorney-General.

(Filed Oct. 8, 1894.)

Petition for cross appeal.

In the United States circuit court of appeals for the fifth circuit, November term, 1893.

THE INTERSTATE COMMERCE COMMISSION, complainant,
vs.
THE CINCINNATI, NEW ORLEANS AND TEXAS Pacific Railway Company, The Western and Atlantic Railroad Company, The Louisville and Nashville Railroad Company, and The Central Railroad and Banking Company of Georgia, said two last-named companies being sued by the name of The Georgia Railroad Company, defendants. } No. 178.

The petition of The Interstate Commerce Commission, complainant, shows that the above-named defendants, conceiving themselves aggrieved by the decree entered in said cause, on the 29th of May, 1894, appealed therefrom to the Supreme Court of the United States, and their appeal was allowed on the 7th of June, 1894, and a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, was ordered to be sent to the Supreme Court of the United States, and the same has been sent there.

Now, within the time allowed by law, comes said The Interstate
5 Commerce Commission, complainant, and feeling itself aggrieved by other rulings in said cause made on the 29th of May, 1894, does hereby make a cross appeal from said decree to the Supreme Court of the United States, and prays that its cross appeal may be allowed, and that an order may be granted touching the transcript of the record and proceedings and papers upon which said decree was made, such as is required by the law in such cases made and provided.

(Signed) GEO. F. EDMUNDS and
N. J. HAMMOND,
Solicitors for Interstate Commerce Commission.

(Filed Oct. 8, 1894.)

Order granting cross appeal.

THE INTERSTATE COMMERCE COMMMISSION, complainant,
vs.
THE CINCINNATI, NEW ORLEANS AND TEXAS Pacific Railway Company, The Western and Atlantic Railroad Company, The Louisville and Nashville Railroad Company, and The Central Railroad and Banking Company of Georgia, said two last-named companies being sued by the name of The Georgia Railroad Company, defendants. } No. 178.

The above-named The Interstate Commerce Commission, complainant, prays a cross appeal from the decree rendered by this court in the above-entitled cause on the 29th day of May, 1894, to the Supreme Court of the United States; and said The Interstate Commerce Commission having filed with the clerk of this court its petition for cross appeal, together with an assignment of errors, and an appeal bond (without security, because said cross appeal is ordered by a department of the Government, as shown by the order of the Atttorney-General to said petition attached); it is
6 ordered, adjudged, and decreed by the court that said cross appeal be granted and allowed, and that because a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, has been sent to the Supreme Court of the United States, no other record be sent up in this cause, except a certificate of this petition, the assignment of errors, and the bond of the Interstate Commerce Commission, and order of the Attorney-General, and of the citation and service thereof.

October 11th, 1894.

(Signed) DON A. PARDEE,
Circuit Judge, 5th Circuit.

(Filed Oct. 13, 1894.)

7 United States circuit court of appeals for the fifth circuit.

I, James M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing six pages, numbered from one to six, inclusive, contain a true copy of the assignment of errors, cross-appeal bond, order of *of* the Attorney-General as to cross appeal, petition for cross appeal, and order allowing same in the case of The Interstate Commerce Commission *vs.* The Cincinnati, New Orleans and Texas Pacific Railway Company and others, No. 178, November term, 1893, as the same remains upon the files and records of said United States circuit court of appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 15th day of October, A. D. 1894.

[SEAL] JAMES M. MCKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

8 The United States of America, fifth judicial circuit.

The President of the United States to the Cincinnati, New Orleans and Texas Pacific Railway Company, the Western and Atlantic Railroad Company, the Louisville & Nashville Railroad Company, and the Central Railroad and Banking Company of Georgia, said two last named companies being sued by the name of The Georgia Railroad Company, greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at Washington, D. C., within 30 days from the date hereof, pursuant to a cross-appeal sued out in the cause lately pending in the United States circuit court of appeals for the fifth circuit, wherein the Interstate Commerce Commission was appellant, and the Cincinnati, New Orleans and Texas Pacific Railway Company, the Western and Atlantic Railroad Company, the Louisville and Nashville Railroad Company, and the Central Railroad and Banking Company of Georgia, said two last named companies being sued by the name of The Georgia Railroad Company, were appellees, to show cause, if any there be, why the decree rendered against the said Interstate Commerce Commission, as in its petition for cross-appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Don A. Pardee, judge of the United States circuit court of appeals for the fifth circuit, this 11th day of October, in the year of our Lord one thousand eight hundred and ninety-four.

DON A. PARDEE,
Circuit Judge.

9 (Indorsed:) C., N. O. & T. P. *R.* Ry. Co. et al., vs. Interstate Com. Com'n. Citation. Marshal's return. Service of this citation acknowledged, & copy waived. Let this cross-appeal be heard with the appeal case. This 17th Oct., 1894. Ed. Baxter. Geo. F. Edwards & N. J. Hammond.

(Indorsement on cover:) U. S. circuit court of appeals, fifth circuit. Case No., 15716. Term No., 832. The Interstate Commerce Commission, appellant, vs. The Cincinnati, New Orleans and Texas Pacific Railway Company et al. Filed October 26, 1894.

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Office Supreme Court, U. S.
FILED.
JAN 2 1895
JAMES H. McKENNEY,
CLERK.

In the United States Circuit Court,

Northern District of New York.

THE INTERSTATE COMMERCE COMMISSION

vs.

THE DELAWARE, LACKAWANA & WESTERN R. R. CO.

In the United States Circuit Court,

District of Nebraska.

OLIVER AMES, Et Al.

vs.

UNION PACIFIC RAILWAY CO., Et Al.

OPINIONS.

FOSTER & WEBB PRINT, NASHVILLE.

UNITED STATES CIRCUIT COURT,

NORTHERN DISTRICT OF NEW YORK.

THE INTERSTATE COMMERCE COMMISSION

v's.

THE DELAWARE, LACKAWANNA & WESTERN R. R. CO. AND OTHERS.

WALLACE, Circuit Judge: The order of the Interstate Commerce Commission which the Court is now asked to enforce prohibits the railway carriers, the parties respondent, from charging any greater compensation for the transportation of window shades of any description, whether the cheap article, worth $3. per dozen, or the hand-decorated article, worth $10 per pair, than the third-class rate, the rate charged for the transportation of the materials used in making window shades. Such an order in my judgment ignores the element of the value of the service in fixing the reasonable compensation of the carrier, and denies him any remuneration for additional risk. I cannot regard it as justifiable upon principle, and must refuse to enforce it.

The petition is dismissed.

UNITED STATES OF AMERICA,
CIRCUIT COURT CLERK'S OFFICE,
NORTHERN DISTRICT OF NEW YORK.

I, William S. Doolittle, Clerk of said Court, do hereby certify that I have compared the annexed copy of Opinion, Wallace, C. J., Interstate Com. Com. vs. the Del., Lacka. & Western R. R. Co. & others, in Eq. No. 6278, and the endorsements thereupon, with the original now on file in this office, that the same is a correct transcript therefrom and of the whole of said original.

In Testimony Whereof, I have caused the seal of the said Court to be affixed at the city of Utica, in said District, this 19th day of December, A.D. 1894. W. S. DOOLITTLE, Clerk.

UNITED STATES CIRCUIT COURT,

DISTRICT OF NEBRASKA.

OLIVER AMES, Et Al.,
vs.
UNION PACIFIC RAILWAY COMPANY, BOARD OF TRANSPORTATION STATE OF NEBRASKA, Et Al., } 59 "Q"

GEORGE SMITH, Et Al.,
vs.
THE CHICAGO & NORTHWESTERN RAILROAD COMPANY, BOARD OF TRANSPORTATION STATE OF NEBRASKA, Et Al., } 60 "Q"

HENRY L. HIGGONSON, Et Al.,
vs.
THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, BOARD OF TRANSPORTATION STATE OF NEBRASKA, Et. Al. } 62 "Q"

Before BREWER, Circuit Justice, and DUNDY, District Judge.

BREWER, Circuit Justice, delivered the following opinion:

In each of these three cases respectively the plaintiffs are stockholders in the corporation first named therein as party defendant. In the first the defendants are the Union Pacific Railway Company, a corporation created under the laws of Congress, and owning and operating a railroad partly within the limits of the State of Nebraska; the St. Joseph & Grand Island Railroad Company, the Omaha & Republican Valley Railroad Company and the Kansas City & Omaha Railroad Company, corporations organized under the laws of the States of Kansas and Nebraska, whose stock is substantially owned and whose

lines are controlled and operated by the Union Pacific Railway Company; and certain officers of the State of Nebraska, constituting its Board of Transportation, together with the Secretaries thereof.

In the second the defendants are the Chicago & Northwestern Railroad Company, a corporation organized and existing under the laws of the States of Illinois, Wisconsin, and Iowa; the Fremont, Elkhorn & Missouri Valley Railroad Company, a corporation organized under the laws of the State of Nebraska; and the Chicago, St. Paul, Minneapolis & Omaha Railroad Company, a corporation organized under the laws of the States of Minnesota and Nebraska, both of which companies are owned and their roads operated by the Chicago & Northwestern Railroad Company; and in addition the Board of Transportation of the State of Nebraska and its Secretaries.

In the third case the defendants are the Chicago, Burlington & Quincy Railroad Company, a corporation organized and existing under the laws of the States of Illinois, and Iowa, which owns, controls and operates in the name of the Burlington & Missouri River Railroad Company in Nebraska our certain lines within that State; and in addition the State Board of Transportation and its Secretaries.

On April 12, 1893, the Legislature of the State of Nebraska passed an Act (Laws 1893, chap. 24, p. 164, Consolidated Statutes of Nebraska, p. 211) spoken of in the records in these cases sometimes as "the Newberry Bill" and sometimes as "House Roll 33," which act prescribed the maximum rates for the transportation of freight by railroads within the State. The Act in terms applies only to freight whose transit begins and ends within the State, and in no manner attempts to affect interstate freight.

The bills in these cases were filed to restrain the State officials from putting that Act in force as against the railroads named.

Pleadings were perfected, a large volume of testimony has been taken, and the cases are now before us upon pleadings and proof for determination.

At the threshold the question arises whether this which purports to be an Act of the Legislature is a law; in other words whether the various steps prescribed by the Constitution as essential to the due passage of a bill through the two houses of the Legislature were all regularly taken. The Act is found duly filed in the office of the Secretary of State, is attested by the signatures of the Speaker of the House and its chief clerk ,also by the signatures of the President of the Senate and its Secretary, is endorsed, "Approved, April 12, A. D. 1893, Lourenso Crounse Govenor," and bears the following additional certificate signed by the chief clerk of the House of Representatives: "I hereby certify that the within Act originated in the House of Representatives and passed the Legislature, April 5, A.D. 1893."

An Act of Congress thus authenticated would be conclusively presumed to have been duly and legally enacted. This precise question was before the Supreme Court of the United States, and fully considered in Field vs. Clark, 143 U. S. 649. Following that decision the Courts of the United States will regard an Act of any State Legislature thus authenticated as having been enacted in full compliance with all the prescribed forms unless there be some special provision in the Constitution of that State, or some decision of its Supreme Court, which requires a looking beyond these evidences of authenticity and determination of the question of due enactment by reference to other kind or matters of evidence or, to state the proposition in another form, the rule prescribed in that case will control unless the State has prescribed some other or further rule.

In the Constitution of Nebraska, Article III., Secs. 8, 10, and 11 are these provisions, which are all that are referred to by counsel, or that seem to have any bearing on this question:

Sec. 8. Each house shall keep a journal of its proceedings, and publish them (except such parts as may require secrecy) and the yeas and nays of the members on any question shall, at the desire of any two of them, be entered on the journal. All votes in either house shall be viva voce.

Sec. 10. The enacting clause of a law shall be, "Be it enacted by the Legislature of the State of Nebraska," and no law shall be enacted except by bill. No bill shall be passed unless by assent of a majority of all the members elected to each house of the Legislature. And the question upon the final passage shall be taken immediately upon its last reading, and the yeas and nays shall be entered upon the journal.

Sec. 11. Every bill and concurrent resolution shall be read at large on three different days in each house, and the bill and all amendments thereto shall be printed before the vote is taken upon its final passage. No bill shall contain more than one subject, and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed. The presiding officer of each house shall sign, in the presence of the house over which he presides, while the same is in session and capable of transacting business all bills and concurrent resolutions passed by the Legislature.

The utmost that can be inferred from these constitutional provisions is that in respect to certain matters evidence may be sought in the journals of the two houses, and evidence which will prevail over that which appears on the enrolled bill as found in the office of the Secretary of State; and this is as far as any decision of the Supreme Court of Nebraska has gone.

In Hull vs. Miller, 4 Neb., 503 that Court held that the office of the journal is to record the proceedings of the house, and that it must appear on the face of the journal that a bill

was passed by a constitutional majority, but also held than an omission therefrom of other matters which the constitution does not in terms require to be entered upon the journal would not invalidate the law, and that it would be presumed in favor of its validity that the Legislature had done that which it ought to have done.

In State vs. Liedtke, 9 Neb. 462 it was claimed that an appropriation bill as it passed both houses named a larger sum than was found in the enrolled bill signed by the govenor, and a mandamus was asked to compel the State Auditor to draw his warrant on the Treasurer for such excess but the court denied the writ, and declined to look into the journals of the two houses to see whether the fact was as claimed, on the ground that even if such sum was in the bill when before the houses it had never received the approval of the Govenor, and had, therefore, never been legally appropriated.

In State vs. McLelland 18 Neb. 236 the matter was considered at some length, and it was held that the certificate of the presiding officers as to the passage of a bill through their respective houses is only prima facie evidence of that fact; that the journals may be examined, and if they show that the bill did not pass, that evidence will be held conclusive, and the supposed law set aside. Similar is the case of State vs. Robinson, 20 Neb. 96. The same proposition was again affirmed in State ex rel. vs. Moore, 37 Neb. 13, on the strength of the prior decisions, the Court, however, saying that were the question a new one it would be inclined to follow the rule laid down by the Supreme Court of the United States, in Field vs. Clark, supra.

In the case at bar the journals of the two houses, fairly construed, affirmatively show that everything was done which the constitution requires shall be done and recorded in the due passage of a bill. It will be sufficient to quote the recitals of the House Journal, those of the Senate Journal being equally explicit.

"JANUARY 14, 1893.

"INTRODUCTION OF BILLS"

"The following bills were read the first time and ordered to a second reading;

House Roll No. 33. A bill for an act to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freights upon each of the railroads in the State of Nebraska."

"JANUARY 16, 1993.

"BILLS ON SECOND READING."

House Roll No. 33. "A bill for an act to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freights upon each of the railroads in the State of Nebraska."

"MARCH 10, 1893.

House Roll 33: "A bill for an act to regulate railroads, to classify rates, to fix reasonable maximum rates to be charged for the transportations of freights upon each of the railroads in the State of Nebraska."

"Was read third time.

"This bill having been read at large on three different days, and the same with all its amendments having been printed."

"The question being,

"Shall the bill pass?"

"Affirmative votes,..... 63.
"Negative votes,..... 30.

"A constitutional majority having voted in favor of the passage of the bill, the bill passed and the title as amended was agreed to."

Mr Speaker: "I move to amend the title by adding the following and to provide penalties for violations of this act. Rhodes.

"The motion prevailed."

"APRIL 6, 1893.

Mr. Speaker: "Announced that he was about to sign House Roll No. 33 while the House was in session and capable of doing business."

As for the parol testimony which was offered tending to show some verbal alterations in the bill after it had passed the House of Representatives, it is enough to say; First, that parol testimony is not admissible to impeach the validity of an Act which by the record is shown to have been duly and legally passed; and, second, even if such testimony were competent the supposed alterations were trifling, and not of a character to affect in any substantial manner the scope and reach of the bill. I am, therefore, clearly of the opinion that this Act passed the Legislature of the State and received the approval of the of the Govenor in due conformity to all substantial constitutional requirements in respect thereto.

From this preliminary matter I turn now to the consideration of various questions elaborately discussed by counsel in respect both to the scope and validity of this law, and the jurisdiction of this Court. Many of them I shall notice but briefly, for, while I have given a careful examination to all, to attempt anything like an elaborate discussion of each would unnecessarily prolong this opinion.

It is insisted that the Union Pacific Railway Company, cannot be subjected to the provisions of this statute because it is a corporation created by Congress, and as such, in the discharge of any of its functions, is subject only to the control of that body. The general question of the power of a State in respect to rates for local freight over a corporation organized under the laws of

Congress was considered in Reagan vs. Mercantile Company, 154 U. S. 413; and it was there held that the mere fact that the corporation was so organized did not exempt it from State control in that respect. It was conceded in the opinion in that case that Congress could wholly remove such a corporation from State control; but it was held that, in the absence of something in the statutes indicating an intention on the part of Congress to so remove it, the State had the power to prescribe the rates for all local business carried by it. Of course, that decision is controlling. It is true there is one provision in the Union Pacific Act which tends to show an intent on the part of Congress to retain to itself full control over all rates, and that is found in the 18th Section of the Act, 12 Stat. 497 as follows:

"And be it further enacted, That whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States, after deducting all expenditures, including repairs, and the furnishing, running, and manageing of said road, shall exceed ten per centum upon its cost, exclusive of the five per centum to be paid to the United States, Congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law."

There is in these words, it will be seen, a special reservation of the power to fix rates, and when this is taken in connection with the general provision in the same section, reserving the right to "add to, alter, amend, or repeal this Act," there is much force in the contention that Congress intended to reserve to itself, as it had the power to do, the sole and absolute control of all the rates to be charged by the company. But I am not fully satisfied that this language warrants such a conclusion. Of course if the Union Pacific Railway Company is not exempt from the operation of this Act no other company is.

Again, it is insisted, that the Act is obnoxious to the charge of denying to the railroads the equal protection of the laws secured

to them by the Fourteenth Amendment to the Constitution of the United States, and this because all the roads in the State are not subject to its provisions. Section Four is relied on to sustain this charge;

"All railroads, or parts thereof, which have been built in this State since the first day of January, 1889, or may be built before the thirty-first day of December, 1899, shall be exempt from the provisions of this Act until the thirty-first day of December, 1899."

The right to classify is conceded, but it is said that this classification is arbitrary, and depends upon no fair and reasonable difference. Attention is called to the fact that since January 1, 1889, the Rock Island Company has built a road from Omaha to Lincoln, which is a part of its main line from Chicago to Denver; that in all of its business the Rock Island Company is in active competition with the several companies whose roads are subject to the provisions of this Act, and that it is an unreasonable unjust discrimination to exempt the Rock Island Company from like subjection. I cannot concur in these views. The principle of classification adopted by the Legislature, whether wise or unwise, is within its power. To divide railroads into two classes, placing in the one all that have been constructed and in operation for a length of time, and whose business must therefore be presumed to have been thoroughly established, and in the other all only recently constructed, is clearly not a mere arbitrary distinction; and this, notwithstanding it may be that one of the recently constructed roads is so fortunate as to have immediately secured a large business. The protection of infant industries is a term of frequent use in the political discussions and history of this country; and to rule that a classification based upon such principle is purely arbitrary and therefore unconstitutional, would certainly be a judicial novelty.

Again, it is insisted that this Act interferes with interstate commerce in two ways: First, it establishes a classification of freights different from that which prevails west of Chicago; and,

in the second place, by reducing local rates it necessarily reduces the rates on interstate business. Neither of these objections seems to me to be well taken. In the first place, the classification of freights by the railroads is a purely voluntary act—not compelled by any statute, and not uniform throughout the country. There is one system which prevails east of Chicago, and one west. It might be more convenient if the classification established by this Act harmonized with that adopted by the railroad companies doing business west of Chicago, but surely the voluntary act of the railroad companies in establishing a uniform classification for certain territory can work no limitation on the power of the State to establish a different classification. To say, for instance, that because the railroad companies have voluntarily placed flour in a certain class, on which a specified rate is to be charged, such voluntary act of mere classification destroys the power of the State to establish a classification which puts flour in another class and subject to another rate, is, to my mind, a most extravagant pretention. Neither can I understand how the reduction of local rates, as a matter of law, interferes with interstate rates. It is true the companies may for their own convenience, to secure business, or for any other reason, rearrange their interstate rates and make them conform to the local rates prescribed by the statute, but surely there is no legal compulsion. The statute of the State does not work a change in interstate rates any more than an act of Congress prescribing interstate rates would legally work a change in local rates. Railroad companies cannot plead their own convenience, or the effects of competition between themselves and other companies, in restraint of the otherwise undeniable power of the State.

It is further insisted by defendants that this Court has no jurisdiction over these actions; first because in the act itself, an adequate legal remedy is provided by petition to the Supreme Court of the State, and courts of equity may not interfere when adequate legal remedies are provided; secondly, because the rates are prescribed by a direct Act of the Legislature, and not

fixed by any commission. I am unable to assent to either of these contentions. The remedy referred to is found in Section 5, which authorizes any railroad company, believing the rates prescribed to be unreasonable and unjust, to bring an action in the Supreme Court of the State, and if that Court is satisfied that the rates are, as claimed, unjust and unreasonable to such company, it may make an order directing the Board of Transportation to permit the railroad to raise its rates to any sum in the discretion of the Board, provided that the rates so raised shall not be higher than were those charged by such railroad on the first day of January, 1893. But this comes very far short of being an adequate legal remedy. Suppose, in such an action the opinion of the Supreme Court is that the rates are unjust and unreasonable, there is no judgment of that Court raising the rates, but only giving to the Board of Transportation a discretion. There is no final judgment relieving the company from the burden of the rates fixed by the Act; it only opens the door to action by the Board of Transportation. Surely, a judgment or decree giving permission to do justice, is not securing justice. It might as well be argued that giving to the Executive power to pardon one convicted of crime is an adequate legal remedy for the correction of errors committed on the trial. An adequate legal remedy is one which secures, absolutely and of right to the injured party relief from the wrong done. But even if it were a full and complete legal remedy it is one which can be secured only in a single Court, and that a Court of the State. And, as was held in the case of Reagan vs. Farmers' Loan & Trust Company, 154 U. S. 362, it is not within the power of the State to tie up citizens of other States, to the Courts of that State for the redress of their rights, and for protection against wrong. The laws of Congress, passed under authority of the Constitution of the United States, open the doors of the Federal Courts to citizens of other States to suits and actions for the prevention or redress of wrong, and the State cannot close those doors. Whatever effect such legislation may have upon the Courts of the State, the Courts of the

United States are as open now as they were before to actions for the protection of citizens of other States in their property rights within the State of Nebraska. And the fact that the rates are absolutely prescribed by direct act of the Legislature, instead of being created by a commission appointed by the State, is immaterial; the commission is but one agency of the State. The substantial question is whether the rates as prescribed work a wrong, or injury, to the property rights of the citizens of other States. I quote in support of these propositions these words from the case last cited:

"A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own Courts. Given a case where a suit can be maintained in the Courts of the State to protect property rights, a citizen of another State may invoke the jurisdiction of the Federal Courts. Cowles vs. Mercer County, 7 Wall. 118; Lincoln County vs. Luning, 133 U. S. 529; Chicot County vs. Sherwood 148 U. S., 529." The equal protection of the laws which, by the Fourteenth Amendment no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

There can be no doubt of the jurisdiction of this Court in actions like these, and its duty to protect the property rights of the plaintiffs against any wrongful invasion thereof, by the State through legislation in any form.

But the grave question still remains, are the rates prescribed in this Act, as the maximum over which the railroad companies may not go, unreasonable, and so unreasonable as to justify the Courts in staying its operation? No more difficult problem can be presented than this. There are so many matters which enter into it, and which must be taken into consideration, before a satisfactory answer can be reached. I think it may assist to a true understanding of the scope of this question, and the various considerations which must enter unto it, if we notice how, as a matter of history, the situation and the question have arisen: So far as the mere question of power is concerned, the transportation of persons and property is equally with the carrying of letters and papers a legitimate function of government. By reason of this, private corporations, acting as common carriers, are given the right to exercise the governmental power of eminent domain, and thus, against the will of the owner, to take his property for their public, or quasi public, uses. But in the history of this country the carrying of papers and letters was assumed by the government, and the transportation of persons and property left to private persons. In other words, the people choose to manage the carrying of the correspondence of the country and to leave the matter of transportation to individuals. With the wisdom of this the Courts have no concern; I simply notice the fact. But in consequence of this, the carrying of letters and papers by strictly governmental agencies became, what may be fairly called, a system, while the transportation of persons and property by private individuals and corporations became a business. In the one there was a simple classification and a uniform rate, and the system was extended wherever population went, and so far as possible to supply all the needs of all parts of the country in the way of transmission of news and letters. Whether, in the carrying out of this system, at the end of each year, there was a profit, or not, was immaterial; it was something which the people of the whole country were doing for the joint and equal benefit of all, and if the expenses exceeded the revenues the common treasury paid the deficiency.

Gain, profit, revenue, are in no sense the object of the post-office. There is no effort to increase the number of letters or papers, by special inducements, with a view of building up an increased business in one place or another, or in one direction or another. With uniform rates and equal facilities all persons and places are served, and the system is improved, and the facilities for carrying and distribution are multiplied and bettered as extensively and as rapidly as Congress, in its judgment, deems for the best interests of the whole people. No citizen in any town or city can get special rates for the carrying of his correspondence no one is favored in the promptness with which his correspondence is carried, or the kind of service which is rendered. The thought and purpose of the postoffice is, equal service to all and uniform rates.

On the other hand, as the Government did not undertate the matter of transportation, it became a business carried on by individuals and corporations, and carried on as other business, with a view to private gain and according to the judgment of those engaged therein. No effort was made by the Government, representing the public, to stay private investment in this business. On the contrary, the whole tenor of legislation was to encourage such investment, and thus to multiply the facilities and agencies of transportation, until now it is estimated that ten billions of dollars are invested in railroad transportation alone. It is unnecessary to stop here to inquire whether this investment was not largely in excess of the needs of the country, and unwisely made. It is enough to know that it has been made, with the acquiescence, if not with the active encouragement, of the public.

Now in the carrying on of any private enterprise, increase of business with increase of profits it is stimulating thought, and for this every variety of action is taken. Advertisement, solicitation, inducement, favors are all freely resorted to, but with the single purpose of larger business and greater gain. It is not

strange that in the carrying on of transportation all the characteristics of other kinds of business are found. Indeed, that is often given as one of the reasons for continuing the present methods in respect to transportation and a matter in eulogy thereof. As evidence of this I need do no more than quote this from the brief of counsel for the Plaintiffs:

"Take the case of the beet sugar factory at Grand Island. Nebraska sugar must be sold in the Chicago market, for instance, in competition with Cuba, Louisiana and Sandwich Islands sugar. If a higher price be asked for Nebraska sugar than for sugar from other regions it will not find a buyer. But the production costs about the same in Nebraska as in Cuba, Louisiana and the Sandwich Islands. High railroad rates will shut it out of Chicago. Low rates must be given. Accordingly the road is compelled by the necessities of the situation, whether it will or not, to give them; its own interests force it to do so. But that is not all. When the enterprise is in its infancy cost of production is greater than elsewhere. Accordingly, the road must make rates so low as to cover this excess of the manufacturer's cost; sometimes so low as to wipe out all the road's profit; sometimes below what the transportation costs the road. Of course, the road cannot always do this, nor can it do it on all its business. It justifies, the irregularity in the exceptional case by the promise of paying business in the future. If helped at first, the new industry, by and by, will give the road a large business and make up all concessions. The present loss is borne in hope of future gain. This is the way all commercial enterprises are carried on. He is most successful who acts on this principle with the best judgment. It is a general law of business."

The beet sugar factory referred to in the above quotation furnishes a clear illustration of the difference between the postoffice system and the transportation business. When the proprietor thought of locating that factory the cost of correspondence was not considered in determining the question of location, while

that of transportation was the principal factor. Not only that it was an uncertain factor. There was no schedule, no tariff, by which he could at a glance determine what the rates of transportation would be from one place or another to the market which he must reach. It became, therefore, a matter of negotiation, of contract, with the transportation companies, and, as stated by counsel, the negotiations resulted in rates at first cheaper than the cost of transportation with the expectation of rates enlarged in the future, or that the loss on that transportation would be made up by extra charges on other transportation. Now, it may be for the interest of Nebraska that the beet sugar industry be developed in that State, and that transportation elsewhere shall be temporarily burdened in order to accomplish this development; or, it may be better for the country at large, and thus for Nebraska, as a part of that country, that the cost of transportation everywhere be as fixed and certain as the cost of correspondence. But whether the one system or the other be the better is not for judicial consideration, for it is a mere matter of policy, involving necessarily no question of the rights of person or property.

It is obvious that in the matter of transportation we are in an experimental or transitional stage. At first, transportation was a mere private business, and managed as such; now there is a growing conviction that the best interests of the people will be subserved by changing it from a business to a system. I say experimental, or transitional, for experience may satisfy that the change is not wise, and that it is better to continue transportation as a business, leaving to the interest of those engaged therein to determine how it shall be managed, and giving to them the power to build up, as counsel has suggested, industries and towns here and there. In such case, the present would be only an experimental stage. Or, it may be that experience will only make more imperative the present demand that transportation shall be a system, with absolute certainty and uniformity of rates, in which case the change will be made, and this will be re-

garded as the transitional era. The transition may be accomplished by the Government taking possession of transportation, and itself discharging that public duty. Certainly that would be the simplest, and, for the courts at least, the easiest solution of the problem which now impends. For by purchase or condemnation, and in a single transaction, the State, paying simply the actual value of the property invested in transportation, would have the same control over transportation that the National Government has over the postoffice system, and could prescribe such rates as it saw fit, making good by general taxation any loss. But as ten billions of dollars are invested in the business of railroad transportation, the public may be reluctant to incur such indebtedness and seek to accomplish the same result of uniformity of rates by means of legislation similar to that before us. In other words, leaving the property in the hands of the present owners, uniformity of rates is sought to be secured by compulsory legislation. Here comes in the embarrassment of present conditions. Property invested in railroads is as much protected from public appropriation as any other. If taken for public uses, its value must be paid for. Constitutional guarantees to this extent are explicit, and in such condemnation proceedings no inquiry is permitted as to how the owners have acquired the property, provided only it be legally held by them. If a farm belongs to an individual, and the public seeks to take it, it must pay its value, and is not permitted to diminish the price by proving the owner acquired the means of purchase by immoral or disreputable practices. He may have made his fortune dealing in slaves, as a lobbyist, or in any other way obnoxious to public condemnation, but if he has acquired the legal title to the property, he is protected in its possession, and can notbe disturbed until the receipt of its actual cash value.

The same rule controls if railroad property is sought to be appropriated. No inquiry is open as to whether the owner has received gifts from State or individuals, or whether he has as

owner managed the property well or ill, or so as to acquire a large fortune therefrom. It is enough that he owns the property, has the legal title, and, so owning, he must be paid the actual value of that property. If he has done any wrong in acquiring or using the property, that wrong must be redressed in a direct action therefor, and cannot be made a factor in condemnation proceedings. These propositions in respect to condemnation proceedings are so well settled that no one ever questions them.

The same general ideas must enter into and control legislation of the kind before us. The value of the property cannot be destroyed by legislation depriving the owner of adequate compensation. The power which the Legislature has is only to prescribe reasonable rates, not any rates. The language of the Constitution of Nebraska in respect to the matter is (Constitution 1885, Art. II. Sec. 4), "And the Legislature may, from time to time, pass laws establishing reasonable maximum, rates of charges for the transportation of passengers and freight on the different railroads in this State." But the foundation of the idea of reasonableness is justice. That which is unjust cannot be reasonable, and when the strong arm of the Legislature is laid upon property invested in railroad transportation, it must be so laid as to do justice to such investors. There can be no justice in that which works to such investors a practical destruction of their property thus invested. It must always be borne in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn at the pleasure of the investors. Railroads are not like stages or steamboats which, if furnishing no profit at one place and under one prescribed rate of transportation, can be taken elsewhere and put to use at other places, and under other circumstances.

The railroad must stay, and as a permanent investment its value to its owners may not be destroyed. The protection of property implies the protection of its value. The authorities on these general propositions are collected in the opinion in the

recent case of Reagan vs. Farmers' Loan & Trust Company, *supra*, and I need not do more than refer to that case.

What is the test by which the reasonableness of rates is determined? This is not yet fully settled? Indeed, it is doubtful whether any single rule can be laid down applicable to all cases. If it be said that the rates must be such as to secure to the owners a reasonable per cent. on the money invested, it will be, remembered that many things have happened to make the investment far in excess of the actual value of the property; injudicious contracts, poor engineering, unusually high cost of material, rascality on the part of those engaged in the construction and management of the property. These, and many other things, as is well known, are factors which have largely entered into the investments with which many railroad properties stand charged. Now, if the public was seeking to take title to the railroad by condemnation, the present value of the property, and not the cost, is that which it would have to pay. In like manner it may be argued that when the Legislature assumes the right to reduce the rates the rates so reduced cannot be adjudged unreasonable if, under them, there is earned by the railroad company a fair interest on the actual value of the property. It is not easy to always determine the value of railroad property, and if there is no other testimony in respect thereto than the amount of stock and bonds outstanding, or the construction account, it may be fairly assumed that one or other of these represents it, and computation as to the compensatory quality of rates may be based upon such amounts. In the cases before us, however, there is abundant testimony that the cost of reproducing these roads is less than the amount of the stock and bond account, or the cost of construction, and that the present value of the property is not accurately represented by either the stocks and bonds or the original construction account. Nevertheless, the amount of money that has gone into the railroad property, the actual investment, as expressed theoretically at least by the amount of stock and bonds, is not to be ignored, even though such sum is

far in excess of the present value. It was said in the case of Reagan v. Farmers' Loan and Trust Company, (P. 412); "It is unnecessary to decide, and we do not wish to be understood as laying down an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money or property; if it be possible without prejudice to the rights of others." It is not always reasonable to cast the entire burden of the depreciation on those who have invested their money in railroads. Take the Union Pacific Railway, for illustration. At the time the Government created the corporation, to induce the building of this transcontinental road through a largely unoccupied territory, it loaned to the company $16,000 a mile, taking as security therefor a second lien on the property, and granting to the corporation the right to create a prior lien to an equal amount, which was done.

There is testimony tending to show that the road in Nebraska could be built to-day for $20,000 a mile. Would it be full justice to the Government, would it satisfy the common sense of right and wrong would it be reasonable, for the State of Nebraska to so reduce the rates that the earnings of the road would only pay ordinary interest on $20,000 a mile, and so, the holders of the first lien being paid their interest, the Government be forced to be content with only interest, on one fourth of its investment? Or, to put the case in a little stronger light; suppose the promoter of this enterprise had been some private citizen, who had advanced his $16,000 a mile as a second lien, and that the road could be constructed to-day for only $16,000 a mile, would it be reasonable and just to so reduce rates as to simply pay to the holders of the first lien reasonable interest, and leave him without any recompense for his investment? Is there not an element of equity which puts the reduction of rates in a different attitude from the absolute taking of the property by virtue of

eminent domain? In the latter case while only the value is paid, yet that value is actually paid, and the owners may reinvest and take the chances of gain, elsewhere, whereas, if the property is not taken, the owners have no other recourse than to receive the sum which the property they must continue to own will earn under the reduced rates. Considerations such as these compel me to say that I think there is no hard and fast test which can be laid down to determine in all cases whether the rates prescribed by the Legislature are just and reasonable, and that often many factors enter into the determination, of the problem. Obviously, however, the effect of the reduction upon the earnings is the first and principal matter to - - - considered. This is a matter of computation.

The power of regulating railroads is often said to be a legislative power vested in the law-making body, to be exercised for the general welfare. Within the term "regulation" are embraced two ideas: One is the mere control of the operation of the roads, prescribing the rules for the management thereof, matters which affect the convenience of the public in their use. Regulation in this sense may be considered as purely public in its character, and in no manner trespassing upon the rights of the owners of railroads. But within the scope of the word "regulation" as commonly used, is embraced the idea of fixing the compensation which the owners of railroad property shall receive for the use thereof, and when regulation in this sense is attempted it necessarily affects the property interests of the railroad owners, and it is "regulation" in this sense of the term that we are to consider in the present cases.

There are certain matters which embarrass these cases, and render all computations more than ordinarily difficult. One is this; the various companies are doing an interstate as well as a local business. If these roads were wholly within the State, and only local business done by them, the computation would be much simplified, and the effect of the reduction in rates upon the

property more easily disclosed. But all of these roads are interstate roads, and a large portion of their business is interstate business.

Some of it is local business in other States than Nebraska. Now, it will not do to look simply at the gross earnings and, because the reduction therein made by the enforcement of this statute still leaves enough to pay reasonable compensation to the owners of the property, uphold the act, because if the Legislature of Nebraska can put in force this tariff for local business, the legislatures of other States through which these roads run, and the Congress of the United States, may make corresponding reductions in the rates on all other business, local and interstate, and the aggregate of such reductions might entirely destroy all earning capacity from the property.

Another matter to be noticed is this: There is in this act no interference with the passenger tariff; but only a maximum for freight rates, so we cannot place all the local expenses over against all the local receipts and draw our conclusions therefrom.

We have an attempt by the legislature to prescribe a maximum tariff for only the transportation of freight within the limits of Nebraska, and are called upon to determine whether the rates so fixed are unreasonable, and afford no fair compensation to those who have invested their means in these railroad properties. In order to determine this, we must ascertain what it costs to carry this local freight, what the receipts have been therefrom, and what reductions will be made in such receipts by the application of this Act; and then we must take such proportion of the gross investment in the roads as the present earnings from local freights bear to the total earnings of the road. From these computations we may see whether the reduction made by this Act in the local freights, if applied to all the company's business, would leave any compensation to the owners, and if so, how much. Obviously, the problem thus presented is

one of exceeding difficulty. Fortunately, we have in Mr. Dilworth, the Secretary of the State Board of Transportation, one of the defendant's witnesses, a gentleman whose competency and credibility are unchallenged. In the Computations which I have made I have relied mainly on his figures. From the labrynth of tables, figures, and estimates, presented in the testimony, and discussed by counsel in their briefs and arguments, let me take these two tables, presented by Mr. Dilworth, which seem to lay the basis for some fair calculations as to the effect of this Act upon the business of the various companies.

EXHIBIT 20.

Tons Carried, Tonnage per Mile, and Percentage of Expenses for Years Ending June 30. 1891, 1892 *and* 1893 (*Nebraska*).

NAME OF ROAD.	No. of tons carried locally.	No. of tons interstate freight carried.	No. tons of local freight carried 1 mile.	No. of tons of interstate freight carried 1 mile.	Total No. of tons, local and interstate, carried 1 mile.	No. of Passengers, local and interstate, carried 1 mile.	Percentage of Expenses to Earnings.
1891.							
Burlington & Missouri R. R. R. in Neb.	538,824	1,448,229	73,075,310	196,415,962	269,491,272	69,594,747	66.24
Chicago, St. Paul, Minn. & Omaha	64,496	228,671	10,267,118	36,397,629	46,664,747	7,403,263	70.78
Fremont, Elkhorn & Missouri Valley	141,056	654,400	21,863,680	101,644,399	123,508,679	24,898,729	49.87
Union Pacific Railway	152,028	1,908,845	28,908,124	362,966,694	391,874,818	66,472,597	68.94
Omaha & Republican Valley	61,448	409,270	4,579,104	30,499,041	35,078,145	10,295,137	120.26
St. Joseph & Grand Island	25,078	178,169	1,497,658	10,640,979	12,138,637	2,308,918	96.44
Kansas City & Omaha	8,743	78,694	403,751	3,634,082	4,037,833	912,210	99.54
1892.							
Burlington & Missouri R. R. R. in Neb.	574,653	1,996,437	91,139,965	316,552,193	407,692,158	70,738,243	64.23
Chicago, St. Paul, Minn. & Omaha	65,762	264,403	11,028,287	44,321,384	55,349,671	8,833,405	65.96
Fremont, Elkhorn & Missouri Valley	158,250	846,312	24,069,200	128,425,903	152,495,103	21,874,987	70.71
Union Pacific Railway	192,865	1,882,112	42,970,322	419,300,773	462,271,095	56,926,269	56.44
Omaha & Republican Valley	63,999	628,351	4,659,127	45,745,647	50,404,774	10,058,342	93.12
St. Joseph and Grand Island	39,657	303,550	2,005,851	15,355,015	17,360,866	2,472,538	74.23
Kansas City & Omaha	10,823	194,089	481,515	8,635,016	9,116,531	864,030	75.19
1893.							
Burlington & Missouri R. R. R. in Neb.	583,204	2,221,605	93,793,675	357,131,753	450,925,428	83,091,418	65.51
Chicago, St. Paul, Minn. & Omaha	78,753	279,218	12,848,551	45,554,417	58,402,968	9,074,093	64.58
Fremont, Elkhorn & Missouri Valley	187,804	800,158	26,855,972	114,511,328	141,367,300	23,209,212	55.66
Union Pacific Railway	220,061	2,068,568	45,948,736	431,949,561	477,898,297	63,422,117	58.51
Omaha & Republican Valley	68,237	483,868	4,257,988	42,706,297	46,964,285	11,028,131	94.14
St. Joseph & Grand Island	60,452	337,647	2,774,860	18,576,845	21,351,705	2,834,169	62.05
Kansas City & Omaha	15,484	205,725	658,534	8,750,126	9,408,660	875,415	76.50

DEFENDANT'S EXHIBIT 4.

Estimate of Local Business and the Effect of House Roll No. 33 on the Following Named Railroads.

	Number of Tons Hauled locally.	Average Amount Received for each Ton Hauled.	Total Amount received for Tons Hauled Locally.	Total Amount of Reduction Caused by H. R. 33.	Amount Received from Passenger Business.	Amount Received for Freight Hauled in Nebraska, including Through and Local.	Total Amount realized on all business done in the State.	Per cent. of Reduction on all Business done in the State by H. R. 33.
Burlington & Missouri R. R., in Neb.	574,653	$2,154 16	$1,237,884	$365,175	$2,369,714	$5,538,766	$7,908,242	.044
Chicago, St. Paul, Minn. & Omaha...	65,762	1,870 89	123,033	36,294	263,458	472,051	763,509	.047
Fremont, Elkhorn & Missouri Valley	158,350	2,126 33	336,714	99,310	598,219	1,495,468	2,093,687	.047
Union Pacific Railway.....	192,865	2,064 98	398,262	117,487	977,264	4,284,793	5,262,057	.022
Omaha & Republican Valley.....	63,999	1,380 26	88,335	26,043	305.668	955,626	1,261,294	.022
St. Joseph & Grand Island.....	39,657	630 51	31,004	8,836	71,083	216,295	287,478	.030
Kansas City & Omaha.....	10,823	612 61	6,630	1,889	41,123	125,530	166,653	.011

Exhibit 4 shows the amount actually received for business within the State during the year ending June 30, 1892, by the various roads whose interests are in controversy in these cases, also the amount of reduction in those receipts which would have resulted if the rates prescribed by House Roll 33 had been in force during that year. In exhibit 20, is found the percentage of expenses to earnings upon the business of those companies. Obviously the cost transportation would be the same whether the companies received the prices which they did in fact receive, or the reduced rates prescribed by House Roll 33. If the cost of hauling local freight was the same as that of the other business done by the roads, in order to ascertain what amount the companies earned from local freight it would be necessary to multiply the gross receipts by the percentage of expenses to earnings. This would show the amount that it cost to carry that freight, and the difference between that cost and the receipts would be the amount of the net earnings. From such net earnings subtract the amount of reduction caused by House Roll, 33, and the result will show whether, under such rates, the companies would have earned anything from local freight, and if so, how much.

Making this computation and placing the results in a table, and we have the following:—

	Gross Receipts or Total Amount Received for Tons Hauled Locally.	Percentage of Expenses to Earnings.	Cost of Hauling Local Freight.	Net Earnings from Local Freight.	Total Amount of Reduction Caused by H. R. 38.	Net Earnings if Rates Prescribed by H. R. 38 had been in force.	Deficiency from Same Cause.
Burlington & Missouri R. R. R. in Neb	$1,237,884	64.23	$795,092	$442,792	$365,175	$77,617	.....
Chicago, St. Paul, Minnesota & Omaha	123,033	65.96	81,152	41,881	36,294	5,587	.....
Fremont, Elkhorn & Missouri Valley	336,714	70.71	238,090	98,624	99,310	.....	$ 686.
Union Pacific Railway	398 262	56.44	224,779	173,483	117,487	55,996	.....
Omaha & Republican Valley	88,335	93.12	82,257	6,078	26,043	.....	$ 19,965
St. Joseph & Grand Island	31,004	74.23	23,014	7,990	8,836	.....	846.
Kansas City & Omaha	6,630	75.19	4,985	1,645	1,889	.....	244.

From this table it will be seen that if during that year these companies had been limited in their charges to the rates prescribed by this House Roll, four of them, to-wit:—The Fremont Elkhorn & Mo. Valley, the Omaha & Republican Valley, the St. Joseph & Grand Island, the Kansas City & Omaha, would not only have received nothing by way of earnings, but would actually have been carrying the freight at a loss. The three other roads would have made respectively net earnings of $77,-617, $5,587, and $55,996. This is upon the assumption that the cost of carrying local freight is the same as that of carrying through freight, and hence, that applying the general per cent of expenses enables us to determine accurately the earnings from local freight. But the testimony shows that the cost of carrying local freight is largely in excess of the cost of other business. The exact per cent of such excess is not disclosed. It may, perhaps, be difficult to determine it accurately, Mr. Fink, a witness for the plaintiffs a gentleman of large experience in railroad transportation, and of national reputation as an authority in such matters, says that the cost of carrying local freight is four times that of carrying through freight. Mr. Utt, another witness for the plaintiffs, who is the Commissioner employed by the Commercial Club of Omaha, to look after railroad transportation matters affecting the business of the City, testifies that the one costs six times as much as the other; while Mr. Dilworth the secretary of the defendant-board, as their principal witness on matters of this kind, also says that it costs more to do local than through business, that the percentage of operating expenses on the local business would exceed the percentage on all business probably 10 per cent, and might run up to 20 per cent—possibly might be higher than that. Of course, this testimony is not like that which we have heretofore been examining, where the figures and per cents are accurate and certain, but is largely in the way of estimate. And yet it is clear from the testimony that the per cent of expenses for carrying local freight is considerably above the total per cent of operating expenses. Now turning to the

last table will be seen that if the cost of carrying local freight was seven per cent more than the general per cent of expenses the Burlington & Missouri River Company would, under the reduction caused by House Roll 33, have earned nothing from the transportation of local freight. If only five per cent the Chicago, St. Paul, Minneapolis & Omaha Road would likewise have earned nothing from that source, and similarly the Union Pacific Railway, if the per cent was 14 1-10 per cent. It is difficult to resist the conviction that, if the rates prescribed by House Roll 33, had been in force during the year ending June 30, 1892, not a single one of these roads would have earned a dollar from the transportation of local freight. It is true that Exhibit 4 shows the effect of the reduction caused by House Roll 33 only for the business of a single year, that ending June 30, 1892, but a comparison of the business in 1891 and 1893, with that for 1892, as found in Exhibit 20, shows an average per cent of expenses less in 1892, than in either of the other years. So that evidently the year 1892 was selected by the Board of Transportation for the making of its table, Exhibit 4, as the most favorable.

But light upon this legislation is further thrown by another table prepared by defendant, as follows:—

DEFENDANT'S EXHIBIT 23.

Statement Showing Mileage, Capital Stock and Funded Debt of the following-named Railroads for the Year Ending June 30th, 1892.

	Entire Mileage.	Capital Stock.	Funded Debt.	Total.	Capital Stock Per Mile.	Funded Debt Per Mile.	Total Per Mile.
C. B. and Q.	5290	$76,397,400	$116,580,980	$192,978.380	$14,439	$22,034	36,473
C. St. P. M. and O	1356	34,050,126	23,742, 00	57,792,926	25,103	17,504	42,608
F. E. and M. V	1300	30,370,000	21,119,000	51,489.000	23,352	16,238	39,590
U. P. Ry	1826	60,868,500	128,734,397	189,602,897	33,318	70,468	103,786
O. and R. V	482	2,420,550	5,941,000	8,361,550	5,021	12,324	17,345
St. J. and G. I	251	4,600,000	8,721,405	13,321,405	18,322	34,768	53,060
K. C. and O	193	4,410,000	2,713,000	7,123,000	22,769	14,007	36,007

Take the Union Pacific Railway, whose net earnings for local freight seem greater than those of any other company, and by this last table it appears to be bonded for $70,468 per mile. The total mileage of that road within the State is 467 miles, so that if the bonded incumbrance were distributed according to mileage the burden resting upon the part of the road within the State of Nebraska would be $32,908,556. Six per cent interest on this (the amount allowed by Act of Congress incorporating the company, and which is the rate on the original mortgages at least) is $1,974,513 or the amount to be paid out of the earnings of the road before the stockholders are entitled to any dividends. From Exhibit 4 it appears that the receipts for all business done in the State was $5,262,057 for hauling local freight, $398,262, or about 7½ per cent of the gross receipts. Local freight, therefore, should earn 7½ per cent of the amount necessary to pay the interest on the bonded indebtedness resting on the lines in the State; 7½ per cent on $1,974,513 is $148,088.

But the net earnings for local freight that year were $173,483, showing that there was only about $25,000 earned from local freight to be distributed among the stockholders, and this upon the assumption, in the face of the testimony to the contrary, that the cost of carrying local freight is exactly determined by the general per cent. of expenses to earnings. By the same table it appears that if the rates prescribed by House Roll 33 had been in force the earnings from local freight upon like assumption, would have been $55,996, or but little more than one-third of the amount necessary to pay the portion of the interest on the bonds properly chargeable to local freight.

If it be said that it is not a fair apportionment of the bonded indebtedness to distribute it by the mileage, because the cost of construction in the mountainous part of the road west of Nebraska was much greater than such cost within the limits of the State, and if it be said that the cost of material and labor at the time of construction was far in excess of the present cost, and

that there was extravagance, if not corruption, in carrying on the work of construction (all of which is undoubtedly true), it is also true that the Act of Congress under which the company was chartered and the road constructed provided for the issue by Government to the Company of bonds to the amout of $16,000 a mile within the limits of the State of Nebraska, to be a second lien and with power in the company to execute a prior mortgage for a like amount. Congress, therefore, in the inception of the work made specific provision for an indebtedness of $32,000 per mile on the road within the limits of the State. In order to meet its share of the interest on such indebtedness the local freight should have earned $67,248, or about $12,000 more than would have been earned under House Roll, 33. Again, there is a volume of testimony as to what it would cost to reproduce these various roads, such amount being as claimed, a fair test of the present value. I shall not, now at least, attempt to make any comparison of this testimony, but for present purposes content myself with taking this concession from the brief of the defendants'. counsel;

"There is sufficient testimony in this record to justify the conclusion that the average cost of reproduction, or value of the roads in the State of Nebraska does not exceed $20,000 per mile, including right of way, railway tracks, equipment, station houses, telegraph lines and terminal properties."

The present value of the Union Pacific Railway property in the State at the sum named in this concession would be $9,340,000. To pay six per cent on this conceded value would require, as its contribution to the earnings from the local freight $42,030. Or, in other words, upon the conceded value, the local freight earnings, as reduced by House Roll 33, would have paid but their proportionate share of 8 per cent interest. If a proportionate reduction in rates was made by other States, and by Congress (and of course such a reduction would be equally within their power) so that the total net earnings of the road would be but 8

per cent on this conceded value, obviously only the holders of the first lien would receive full interest on their indebtedness, while the holders of subordinate liens would receive but a fraction thereof; all the stockholders would go without compensation, and soon their investment be swept away by foreclosure proceedings. Take the same process of computation and apply it to the only other company which would have any amount of earnings under the reduction caused by House Roll 33, to-wit:—The Burlington & Missouri River R. R. in Nebraska. Beyond the statement in Exhibit 23 of the capital stock and funded debt per mile of the Chicago Burlington & Quincy Company (which owns and operates the B. & M. R. R. R.) we have from the testimony of the Auditor the exact amount of mortgage indebtedness resting upon the road within the limits of the State and the amount of interest charges due therefrom, to-wit, an indebtedness of $45,268,992.80, and interest charges for the year 1892, $2,224,171.17. The amount received for local freight was about 16 per cent of the total amount realized on all business done in the State as appears from Exhibit 4. Sixteen per cent, therefore of this interest should have been earned by the local freight sixteen per cent is $355,867. But the table shows that the net earnings therefrom under the rates prescribed by House Roll 33, for that year would have been only $77,617—not a fourth of the amount which it should contribute to the payment of such interest.

But again, as Mr. Dilworth testified, the average reduction on local rates caused by House Roll 33, is 29½ per cent. The tariff which was in force at the time of the passage of this Act had been for some three or more years fixed by the voluntary action of the railroad companies, and the reduction of 29½ per cent. was from its rates. It must be remembered that these roads are competing roads, that competition tends to a reduction of rates, sometimes, as the history of the country has shown, below that which affords any remuneration to those who own the property. Can it be possible that any business so carried on can suffer a reduction of 29½ per cent. in its receipts without ruin? What

would any business man, engaged in any business of a private character, think of a compulsory reduction of his receipts to the amount of 29½ per cent.? the effect of this testimony is not destroyed by the table, offered, of the per centage of reduction on the total amount of business done by these companies in the State, as follows:—

B. & M. R.	4.2 per cent.
C., St. D., M & O.	4.5 per cent.
F., E. & M. V.	4.1 per cent.
U. P.	2.0 per cent.
O. & R. V.	1.9 per cent.
St. J. & G. I.	2.7 per cent.
K. C. & O.	1.5 per cent.

For such a table indicates, as is further shown by defendant's Exhibit 4, how small a proportion of the total amount of business done in the State comes from purely local freight. Nor is it weakened by any comparison between the amount of reduction and the total receipts from all business. It may be, as stated by counsel, that the annual earnings of the Chicago, Burlington & Quincy Company are $27,916,128 and that the total amount of reduction caused by this House Roll 33 is only $365,-175. It may be that the capital stock of the company is $76,-407,500, and that $365,175 distributed among the stockholders may not be for any of them a great sum; but the entire earnings of the C., B. & Q. are more than twenty times the receipts from local freights in Nebraska, and to reduce such earnings by twenty times $365,175 would make a startling difference in their amount. The fact that the State of Nebraska can reach only 1-20th of the total earnings gives it no greater right to make a reduction in respect to that 1-20th than it would have had it the power over the total earnings, and attempted in them a like per cent. of reduction. If it would be unreasonable to reduce the total earnings of these roads 29½ per cent., it is prima facie as least equally unreasonable to so reduce any single fractional part of such earnings.

It is however urged by the defendants that, in the general tariffs of these companies, there is an inequality, that the rates in Nebraska are higher than those in adjoining States, and that the reduction by House Roll 33 simply establishes an equality between Nebraska and the other States through which the roads run. The question is asked are not the people of Nebraska entitled to as cheap rates as the people of Iowa? Of course, relatively, they are. That is, the roads may not discriminate against the people of any one State, but not necessarily absolutely as cheap; for the kind and amount of business, and the cost thereof, are factors which determine largely the question of rates, and these vary in the several states. The volume of business in one State may be greater per mile, while the cost of construction and of maintenance is less. Hence, to enforce the same rates in both States might result in one in great injustice, while in the other it would only be a reasonable and fair. Comparisons, therefore, between the rates of two States are of little value unless all of the elements that enter into the problem are presented. It may be true, as testified by some of the witnesses, that the existing local rates in Nebraska are forty per cent higher than similar rates in the State of Iowa. But it is also true that the mileage earnings in Iowa are greater than in Nebraska. In Iowa there are 233 people to each mile of railroad, while in Nebraska there are but 190, and, as a general rule, the more people there are the more business there is. Hence, a mere difference between the rates in two States is of comparatively little significance.

Another matter must be noticed; as heretofore stated, the year 1892, upon which the estimates given by Mr. Dilworth are made, seems to have been the most favorable of the three years in respect to which figures are given. In addition to the inference drawn from these tables, the testimony of witnesses shows that that year was one one of the most prosperous years for railroad business in quite a length of time. Now, it is one of the difficulties of this case that no provision is made for the varying conditions of business in different years, and parts of years.

Maximum rates are prescribed above which the roads may not go, no matter what unforeseen events may affect the amount of business which they are doing. Indeed, since the argument of these cases the railroad business in the West suffered a most serious prostration growing out of the fearful strikes in the month of July. A statutory and fixed tariff, like the one before us, has no provisions for such contingencies as that. The loss is cast absolutely and wholly upon those who have invested their money in railroad business. In short, it deprives these property owners of all chances to make profit which result from private control of business, and compels them to pay out of their pockets all the losses which result from the enforcement of an absolute system.

I might prolong this opinion, and notice many other matters which have been referred to by counsel. I have done a great deal of work in computations—work which is properly the duty of a Special Master, but which I have done in order to satisfy myself as to the effect of this reduction of rates on the business of these railroads. I have not attempted to introduce all of these computations into this opinion: It is long enough as it is. The computations and tables which I have placed indicate the lines of inquiry which have seemed to me most satisfactory. The conclusion to which I have come is that, having regard to the present condition of affairs in the State the present volume of business done over these roads, and any probabilities of an early change in that volume a reduction of 29½ per cent in the rates for local freight is unjust and unreasonable to those who have invested their money in these railroad properties. I appreciate fully the embarrassments and difficulties attending an investigation of this kind. I am reluctant, as every judge should be, to interfere with the deliberate judgment of the Legislature; I have taken much time to study this case in all its relations, and have come, though reluctantly to the conclusion I have stated, and am, therefore, constrained to order decrees in behalf of the plaintiffs, staying the enforcement of this tariff upon the

companies named in the bills. It may be said that, even if furnishing no reasonable remuneration to-day, the result might be different under an increase of business. That, of course, is possible; and it may be that, as the volume of business increases, the time will come when the rates fixed by this House Roll 33 will be reasonable and just. So, there should be entered, as a proviso to the decree, that leave is reserved to the defendants, at any time that they are so advised, to move the Court for a re-investigation of the question of the reasonableness of these rates.

UNITED STATES OF AMERICA, }
DISTRICT OF NEBRASKA. } SS.

I, Elmer D. Frank, Clerk of the Circuit Court of the United States for the District of Nebraska, certify that I have compared the annexed copy of Opinion of Judge Brewer in Maximum Rate Cases, Nos. 59, 60 & 62 "Q," with the original on file in this office, and that the same is a correct transcript thereof, and of the whole of said original.

In Testimony Whereof, I have caused the seal of said Court to be hereunto affixed at the city of Omaha, in said District, this 3d day of December, 1894. ELMER D. FRANK, Clerk.

Office Supreme Court, U. S.
FILED,
JAN 2 1895
JAMES H. MCKENNEY,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 729.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO. ET AL.,
Appellants,

vs.

THE INTERSTATE COMMERCE COMMISSION,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 832.

THE INTERSTATE COMMERCE COMMISSION,
Appellant,

vs.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO. ET AL.,
Appellees.

CROSS APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

ARGUMENT FOR APPELLANTS.

EDW. COLSTON,
GEO. HOADLEY, JR.,
OF COUNSEL FOR C., N. O. & T. P. RY. CO.
JOS. B. CUMMING.
GEO. HILLYER,
OF COUNSEL FOR G. [redacted]
PAYNE & TYE,
OF COUNSEL FOR W. & A. R. R.
ED. BAXTER,
OF COUNSEL FOR L. & N. R. R. CO.

FOSTER & WEBB PRINT, NASHVILLE.

Supreme Court of the United States.

OCTOBER TERM, 1894.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO., ET. AL., Appellants,

vs.

THE INTERSTATE COMMERCE COMMISSION. Appellee.

No. 729.

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

THE INTERSTATE COMMERCE COMMISSION, Appellant,

vs.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO., ET. AL., Appellees,

No. 832.

CROSS APPEAL

From the United States Circuit Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE.

I.

The Decree Appealed From.

The Appeal and Cross Appeal in this case are from a decree rendered by the United States Circuit Court of Appeals for the Fifth Circuit; and they involve the question as to whether certain orders made by the Interstate Commerce Commission are lawful.

First: The Commission ordered the Appellants, the Cincinnati, New Orleans & Texas Pacific Railway Company, the Western & Atlantic Railroad Company, and the Georgia Railroad Com-

pany to "cease and desist from charging or receiving any greater compensation in the aggregate for the transportation, in less than car loads, of buggies, carriages, and other articles classified by them as freight of the first class, for the shorter distance over the line formed by their several railroads from Cincinnati, in the State of Ohio, to Social Circle, in the State of Georgia, than they charge or receive for the transportation of said articles over the same line from Cincinnati, aforesaid, to Augusta, in the State of Georgia."

Second: The Commission further ordered the Appellants, the Cincinnati, New Orleans & Texas Pacific Railway Company, and the Western & Atlantic Railroad Company to "cease and desist from charging or receiving any greater aggregate compensation for the transportation of buggies, carriages, and said other first class articles, in less than car loads, from Cincinnati, aforesaid, to Atlanta, in the State of Georgia, than one dollar per hundred pounds."

Transcript, page 22.

The Appellants being advised that said orders were not lawful, declined to obey them; and the Commission filed a bill in the Circuit Court of the United States for the Northern District of Georgia, against the Appellants, praying that they be restrained from further continuing in their violations of, and disobedience to, said orders.

Transcript, pages 1–5.

The Appellants severally answered said bill, insisting that said orders were not lawful. Testimony was taken in the Circuit Court by both parties, and a final decree was rendered by the Circuit Court, that the matters of equity alleged in the bill were fully denied in the answers, and were not sustained by the proof; and the bill was ordered to be dismissed.

Transcript, page 78.

The Commission appealed from the decree of the Circuit Court to the Circuit Court of Appeals for the Fifth Circuit.

Transcript, pages 78, 79.

The Circuit Court of Appeals reversed the decree of the Circuit Court, and ordered the cause to be remanded to the Circuit Court, with instructions to enter a decree "in favor of the complainant, the Interstate Commerce Commission, and against the defendants, the Cincinnati, New Orleans & Texas Pacific Railway Company, the Western & Atlantic Railroad Company, and the Georgia Railroad Company, commanding and restraining the said defendants, their officers, servants, and attorneys, to cease and desist from making any greater charge in the aggregate on buggies, carriages, and on other freight of the first class, carried in less than car loads, from Cincinnati to Social Circle, than they charge on such freight from Cincinnati to Augusta, etc.," "and denying the relief prayed for in relation to charges on like freight from Cincinnati to Atlanta."

Transcript, page 389.

The Cincinnati, New Orleans & Texas Pacific Railway Company, the Western & Atlantic Railroad Company, the Louisville & Nashville Railroad Company, and the Central Railroad & Banking Company of Georgia (said two last named companies being sued by the name of the Georgia Railroad Company), prayed and obtained an appeal from said decree of the Circuit Court of Appeals.

Transcript, page 394.

Their assignment of errors will be found on pages 390–393 of Transcript.

The Commission prayed and obtained a cross appeal from said decree.

Transcript of cross appeal, page 3.

Its assignment of errors will be found on page 1 of said last-mentioned Transcript.

The Commission complains of said decree for "not holding that in point of law the said the Interstate Commerce Commission had power to fix the maximum rate which it did fix (i. e., from Cincinnati to Atlanta), as shown by the record;" and for "not holding that the evidence justified the rate fixed by said Interstate Commerce Commission," and for not decreeing accordingly.

The Commission delivered a written opinion.

Transcript, page 11–21.

The Circuit Court also delivered a written opinion.

Transcript, page 52–77.

But the Circuit Court of Appeals did not deliver any written opinion.

II.

The Rate from Cincinnati to Atlanta.

The Cincinnati, New Orleans & Texas Pacific Railway Company (hereinafter designated as the C., N. O. & T. P. Ry.), has a line of railroad extending from Cincinnati, O., to Chattanooga, Tenn., a distance of 336 miles.

Transcript, page 14.

The established through rate of said company on first class freight, in less than carloads, released, when shipped from Cincinnati, destined to stop at Chattanooga, is 76 cents per hundred pounds.

Transcript, page 15.

Vehicles, such as buggies and carriages, when shipped in less than carloads, boxed or crated, "knocked down," and released, go as "first class."

Transcript, page 15.

The Western & Atlantic Railroad Company (hereinafter designated as the W. & A. R. R.), has a line of road extending from Chattanooga, Tenn., to Atlanta, Ga., a distance of 138 miles.

Transcript, page 14.

The established through rate of said company on first-class freight in less than carloads, released, when shipped from Chattanooga destined to stop at Atlanta, is 57 cents per hundred pounds.

Transcript, page 14.

The through rate from Cincinnati to Chattanooga being 76 cents, and the through rate from Chattanooga to Atlanta being 57 cents, the sum of those rates would make the total first class rate from Cincinnatiti to Atlanta $1.33 per hundred pounds. But, in order to meet competition at Atlanta, the C., N. O. & T. P. Ry. and the W. & A. R. R. united in a joint through tariff on traffic *from Cincinnati to Atlanta*, and agreed to charge a *joint* through rate from Cincinnati to Atlanta of $1.07 per hundred pounds, on first class freight. They also agreed to divide that *joint* through rate between them in certain proportions. Under that division the C., N. O. & T. P. Ry. receives 75 9–10 cents and the W. & A. R. R. receives 31 1–10 cents.

Transcript, page 15.

The Commission ordered the *joint* through rate from Cincinnati to Atlanta, on first class freight, to be reduced from $1.07 per hundred pounds, to $1 per hundred pounds.

Transcript, pages 19–21.

Appellants insist that the Act to regulate commerce does not confer upon the Commission any authority to fix maximum rates for the transportation of traffic.

III.

The Rate from Cincinnati to Augusta.

The Georgia Railroad & Banking Company owns a line of railroad extending from Atlanta, Ga., to Augusta, Ga., a distance of 171 miles. The road lies altogether in the State of Georgia.

Transcript, page 14.

Said road was leased for a long term of years to William Wadley, who assigned his interest as lessee to the Louisville & Nashville Railroad Company, and the Central Railroad & Banking Company of Georgia. Said assignees jointly operate said road under the name of the "Georgia Railroad," and it will be hereinafter so designated.

IV.

The law of the State of Georgia authorizes and requires the Railroad Commissioners of that State to make for each of the railroad corporations doing business in the State "just and reasonable rates of charges;" and the schedules of rates so made by said Commissioners are, by said law, to "be deemed and taken in all courts of this State as *sufficient* evidence that the rates therein fixed are just and reasonable, etc."

Transcript, page 263.

V.

The established through rate of the Georgia Railroad, on first class freight, in less than carloads, released, when shipped from Atlanta destined to stop at Augusta, is 64 cents per hundred pounds.

Transcript, page 15.

Said rate is made with the approval of the Railroad Commission of Georgia.

Transcript, pages 275–293, 294, 295.

The through rate from Cincinnati to Chattanooga being, as stated above, 76 cents, the through rate from Chattanooga to Atlanta being 57 cents, and the through rate from Atlanta to Augusta being 64 cents, the sum of those rates would make the total first class rate from Cincinnati to Augusta $1.97 per hundred pounds.

But, in order to meet competitition at Augusta, the C., N. O. & T. P. R'y, the W. & A. R. R., and the Georgia Railroad, united in a *joint* through tariff on traffic *passing all the way through from Cincinnati to Augusta*, and agreed to charge a *joint* through rate from Cincinnati to Augusta of $1.07 per hundred pounds on first class freight. They also agreed to divide the *joint* through rate between them in certain proportions. Under that division the C., N. O. & T. P. R'y receives 55 7-10 cents, the W. & A. R. R. receives 22 9-10 cents, and the Georgia Railroad receives 28 4-10 cents.

Transcript, page 15.

VI.

The Rate from Cincinnati to Social Circle.

With reference to traffic from Cincinnati, destined to stop at Social Circle, and other similar strictly local stations on the Georgia Railroad, where no competition exists, the Georgia Railroad refuses to unite with the other two roads in a *joint* through tariff, and refuses to agree with them upon a *joint* through rate.

Social Circle is a strictly local station on the Georgia Railroad, 52 miles east of Atlanta, and 119 miles west of Augusta.

Transcript, page 14.

When first class freight is shipped from Cincinnati, destined to stop at Social Circle, the C., N. O. & T. P. R'y and the W. & A. R. R. charge their *joint* through rate of $1.07 per hundred pounds, for transportation from Cincinnati to Atlanta; which is the regular rate charged to every one on all such shipments from Cincinnati to Atlanta.

When such shipments arrive at Atlanta the Georgia Railroad treats them, as it treats all other shipments received by it at Atlanta, when destined to stop at its strictly local stations; and charges its local rate, as allowed and approved by the Georgia Railroad Commission; which, on first class freight, shipped from Atlanta, destined to stop at Social Circle, is 30 cents per hundred pounds.

Transcript, page 289.

In other words, the Georgia Railroad charges upon such shipments the same rate as it charges merchants, and other persons living in Atlanta, who ship similar freights from Atlanta destined to stop at Social Circle.

Transcript, page 289.

The total rate from Cincinnati to Social Circle on first class freight is, therefore, $1.37; it being a *combination* rate, made up of the *joint* through rate of $1.07 charged by the C., N. O. & T. P. R'y, and the W. & A. R. R., for transportation from Cincinnati to Atlanta, added to the local rate of 30 cents charged by the Georgia Railroad for transportation from Atlanta to Social Circle.

Transcript, page 287.

The Georgia Railroad receives no part of the *joint* through rate of $1.07, which is charged by the C., N. O. & T. P. R'y, and the W. & A. R. R., for transportation from Cincinnati to Atlanta; and they receive no part of the local rate of 30 cents, which is

charged by the Georgia Railroad for transportation from Atlanta to Social Circle.

Transcript, page 289.

The Commission ordered that the *combination* rate (of $1.37), from Cincinnati to Social Circle, be reduced to the *joint* through rate (of $1.07) from Atlanta to Augusta; which was, in effect, to order the Georgia Railroad to reduce its local rate (of 30 cents) from Atlanta to Social Circle to its proportion (28 4-10 cents) of the *joint* through rate from Cincinnati to Augusta.

Appellants insist that the Commission had no right to compare the local rate charged by the Georgia Railroad with the proportion which that road receives of a joint through rate; and that the joint through traffic from Cincinnati to Augusta is not conducted under substantially similar circumstances and conditions with the traffic from Cincinnati to Social Circle.

VII.

Proceedings Before the Commission.

The James & Mayer Buggy Company filed a petition before the Interstate Commerce Commission against the C., N. O. & T. P. R'y, the W. & A. R. R. and the Georgia Railroad, in which it claimed that, in shipping vehicles from Cincinnati to Atlanta, Ga., it "ought not to be compelled to pay the same rate of freight as when shipping to Augusta, Ga., a point 171 miles further distant on the same *lines;*" that "in shipping vehicles from Cincinnati to Social Circle, Ga., (it) ought not to be compelled to pay a rate of freight which is 30 cents per hundred pounds higher than when shipping to Augusta, Ga., a point 120 miles (more or less), further distant along the same *lines;*" and it insisted that the defendants to said petition were "violating *section* 4 of the Act to Regulate Commerce, in charging a greater sum for a shorter

distance than for a longer distance in the same direction over the same *lines*."

Transcript, page 6.

There was no complaint as to the rate upon any articles carried in the first class, except as to buggies, carriages and other vehicles.

There was no complaint that the *joint* through rate on first class articles from Cincinnati to Atlanta was unjust or unreasonable, in and of itself. There was no complaint that said rate was too high, except as compared with the *joint* through rate from Cincinnati to Augusta, a point 171 miles further distant than Atlanta, from Cincinnati.

There was no complaint that the *combination* rate from Cincinnati to Social Circle was unjust or unreasonable, in and of itself. There was no complaint that said rate was too high, except as compared with the *joint* through rate from Cincinnati to Augusta, a point 120 miles further distant than Social Circle, from Cincinnati.

It is manifest that the only ground of complaint which the James & Mayer Buggy Company intended to prefer was, that the defendants to said petition were violating *Section* 4 of the Act to Regulate Commerce.

Said Company did not intend to charge that said defendants were violating either one of the first three sections of that Act.

Transcript, pages 5 and 6.

VIII.

The defendants to said petition, in their several answers before the Commission, insisted that there is nothing in the Act to Regulate Commerce which requires that the rate from Cincinnati to Atlanta shall be less than the rate from Cincinnati to Augusta,

even though it be true that Augusta is further distant than Atlanta, from Cincinnati.

They insisted that notwithstanding the *combination* rate charged from Cincinnati to Social Circle was greater than the *joint* through rate charged from Cincinnati to Augusta, it did not constitute a violation of the fourth section, because the transportation in the two cases was not conducted "under substantially similar circumstances and conditions."

They averred that at Baltimore, Md., and other Eastern cities there are large manufactories of buggies, carriages, etc., the product of which is transported from said places to Augusta at such rates, that if a rate higher than $1.07 per hundred pounds be charged from Cincinnati to Augusta, no freight of that character would come over their railroads, because the product of the Eastern factories would be delivered in Augusta at a rate which would exclude the Cincinnati product from the Augusta market.

They insisted that the local rate (of 30 cents per hundred pounds), from Atlanta to Social Circle, is just and reasonable, and that the *combination* rate (of $1.37 per hundred pounds), from Cincinnati to Social Circle, is also just and reasonable.

Transcript, pages 7 and 8.

IX.

The Decision of the Commission.

The Commission decided that though the greater distance would ordinarily warrant higher charges to Augusta than would be justifiable to Atlanta on Cincinnati freight, still, if the carriers, to secure traffic to Augusta, accepted Atlanta rates, which afford less profit in proportion to distance, there can be no legal objection; unless, by accepting the same rates to Augusta, the defendants may "subject any particular person, company, firm, corporation or locality, or any particular description of traffic to

any undue or unreasonable prejudice or disadvantage." The Commission states that it was not claimed, nor did it appear, that any such prejudice or disadvantage results from the acceptance of rates which are somewhat lower than might be legally exacted on Augusta shipments from Cincinnati.

The complaint of the James & Mayer Buggy Company that the rate from Cincinnati to Atlanta is too high because it is the same as the rate from Cincinnati to Augusta, a point 171 miles further distant than Atlanta, from Cincinnati, was not sustained by the Commission, and it is now in controversy. At all events, the rate from Cincinnati to Atlanta is not now controverted *upon that ground.*

Transcript, page 17.

The Commission decided that the circumstances and conditions which would justify a lower rate from Cincinnati to Augusta than from Cincinnati to Social Circle, must have relation "*to the nature and character of the service rendered by the carrier*" in the transportation between Cincinnati and the places on the same line; that the competition *by water* which would bring the transportation within the exception of the statute, "is competition in transportation *to the longer distance point*, and as to freight, which if not carried to such longer distance point by the defendant roads, could reach such destination by *water* transportation."

The Commission said: "There is no contention that the alleged difference in circumstances and conditions has any relation to the *cost of transportation* of the freight for the shorter and longer distances from Cincinnati to Social Circle and Augusta, respectively, or that such alleged difference or dissimilarity has any reference to transportation by *water*, or *water competition* between Cincinnati and Augusta; or that such freight might or could be taken by any *water*, or *part water*, route, from Cincinnati to

Augusta, unless a rate is maintained from Cincinnati to Augusta lower than a reasonable rate to Social Circle."

In other words, the Commission held that the "circumstances and conditions" referred to in the fourth section of the Act to regulate commerce "must have relation *to the nature and character of the service* rendered by the carrier as affecting *the cost of transportation*;" or, to competition "by *water*;" and that competition, even by water, cannot be considered as a "circumstance or condition," affecting the transportation, unless it can be shown that the freight might, or could, be taken by a *water* route or *part water* route *from Cincinnati to Augusta.*

The fact that there may be competition by *rail* between Cincinnati and Augusta, which compels the carriers to accept a less rate to Augusta than would be a reasonable rate to Social Circle is not a "circumstance or condition" which, in the opinion of the Commission, can be legitimately considered under the fourth section.

The fact that competition, even by *water*, exists between Baltimore and Augusta, and compels carriers from Cincinnati to accept rates from Cincinnati to Augusta, which are less than reasonable rates from Cincinnati to Social Circle, is not a fact which the Commission regards as a legitimate "circumstance or condition," within the meaning of those words as used in the fourth section. The Commission, therefore, held that the mere fact that a greater rate was charged from Cincinnati to Social Circle than from Cincinnati to Augusta, constitutes a violation of the fourth section. That raises one of the questions which is now in controversy.

Transcript, pages 19 and 18.

As to the rate between Cincinnati and Atlanta, there was but a single witness who testified before the Commission, and he testified: "That he considered $1.01 per hundred pounds, in less than carloads, a reasonable rate on first class freight from Cincinnati, O., to Atlanta, Ga." It was also made to appear to the Commis-

sion that the rate on first class freight from Cincinnati to Birmingham, Ala., is 89 cents, as compared with $1.07 to Atlanta; the distances being substantially the same. The Commission said: "There is apparently nothing *in the nature and character of the service* to justify such difference, or in fact to warrant any substantial variance in the Atlanta and Birmingham rate from Cincinnati."

With nothing before the Commission except the testimony of one witness, and the fact that the rate from Cincinnati to Birmingham was less than the rate from Cincinnati to Atlanta, the Commission ordered the rate from Cincinnati to Atlanta to be reduced from $1.07 to $1 per hundred pounds, and the reduction was made to apply not only to buggies and carriages, but to all other articles carried in the first class. That raises another question which is now in controversy.

Transcript, pages 16 and 17.

X.

The Decision of the Circuit Court.

Hon. William T. Newman, presiding in the Circuit Court, held that on proceedings in that court, under the 16th section of the Act to regulate commerce, to enforce orders made by the Commission, the facts found by the Commission are not conclusive, but merely *prima facie* evidence; that the case is to be heard in the Circuit Court, *de novo*, upon proper pleadings and proofs, the latter including not only the *prima facie* facts reported by the Commission, but all such other and further testimony as either party may introduce bearing upon the matters in controversy.

Transcript, page 59.

The Circuit Court further held that the traffic from Cincinnati to Social Circle, in issue here, as to the Georgia Railroad Company, is local, and that company is not, on the facts presented,

made a party to a joint or common arrangement such as makes the traffic to Social Circle subject to the control of the Interstate Commerce Commission; that the arrangement for a through rate from Cincinnati to Augusta, constitutes a "new line" between Cincinnati and Augusta, which line is separate and distinct from "the line" of the Georgia Railroad; and that the local rates charged by the Georgia Railroad upon its separate line, to local points on its railroad, cannot be compared with the through rates charged by the "new line" from Cincinnati to Augusta, for the purpose of raising a question under the long and short haul clause of the Act to regulate commerce.

Transcript, pages 59–66.

The Circuit Court further held that competition between railroads, even though all of such railroads be subject to the Act to regulate commerce, may be regarded, as well as water competition, in considering the "circumstances and conditions" referred to in the 4th section of the Act.

Transcript, pages 66–72.

The Circuit Court further held, that competition of market with market, as well as competition of carrier with carrier, may be regarded in considering the "circumstances and conditions" referred to in the 4th section.

Transcript, pages 72 and 73.

The Circuit Court further held, that the fact that the rate from Cincinnati to Social Circle is greater than the rate from Cincinnati to Augusta, does not, under the "circumstances and conditions" existing in this case, constitute an undue preference in favor of Augusta, nor an undue prejudice or disadvantage against Social Circle; and, therefore, that there has been no violation of the 3d section of the Act to regulate commerce.

Transcript, page 73.

The Circuit Court further held, that the evidence offered by the railroad companies in that court, as to the reasonableness of the rate from Cincinnati to Atlanta, was sufficient to overcome the *prima facie* case made by the findings of the Commission in regard to that rate; and, therefore, the Court deemed it unnecessary to go into a discussion as to whether the action of the Commission in regard to that rate was, in effect, "making or fixing a rate;" or as to whether the Commission has authority, under the Act to regulate commerce, to make or fix rates for carriers subject to the Act.

Transcript, pages 75–77.

XI.

Testimony of Experts as to What are the Circumstances and Conditions Which Affect Transportation Service.

The Appellants have taken the testimony of a large number of prominent railroad experts to show what, *as a matter of fact*, are the circumstances and conditions which affect transportation service. They have endeavored to show "*all* the circumstances and conditions that may justify differences in rates."

What are "the conditions that govern railway traffic?" What "are the circumstances under which it is transported?" What are "the circumstances and conditions that may justify differences in rates?" Manifestly all of those questions are questions of *fact*, upon which the testimony of competent railroad experts is entitled to full consideration by the court.

XII.

Mr. Albert Fink, who was connected with the traffic department of the railroad service in the United States from 1865 to 1889, and who was Commissioner of the Trunk Line Association

from 1875 to 1889, in testifying as to what are the conditions which control the establishment of transportation rates, said:

"At points where competition exists between several railroad carriers, or between railroad and water carriers, the carrier which makes the lowest rates determines the rates that can be charged by its competitors. The railroad tariffs of this country are everywhere influenced by competition between carriers, and especially by competition with water carriers. The railroad traffic managers can only study the force of the competition and adjust the rates accordingly." . . . "Competition between markets influences the railroad carriers in the same manner, and to the same extent, as the competition between carriers, with this difference: That no agreement between carriers could do away with the effect of such competition."

Transcript, page 95.

Mr. George R. Blanchard, who has been connected with the traffic department of the railroad service of the United States for thirty years, and who is the Chairman of the Central Traffic Association of Railways, said:

"The competition between carriers is always influential, if not potential, and rival transportation must be conducted with reference to the rates, time, condition of handling which contestants offer, be they in direct, or indirect rivalry.

"That railway, or route, which presents the maximum facilities for the minimum of all included costs, presents conditions which its railway rival must conform to or abandon the traffic." . . . "The competition between markets affects the circumstances and conditions under which property is transported, perhaps, more than the rivalries of carriers to the same market."

Transcript, pages 337 and 338.

Mr. James F. Goddard, who has been connected with the traffic department of the railroad service in the United States, since 1868, and who is now the Commissioner of the Trunk Line Association, said:

"As a general rule, it may be stated that between points

which are competitive between several carriers, whether all rail, rail and water combined, or only by water, the lowest rate made by any carrier fixes the measure for all." . . . "Competition between markets also has a powerful influence in the determination of rates."

Transcript, page 103.

M. H. Smith, who has been connected with the traffic department of the railroad service in the United States since 1860, and who is President of the Louisville & Nashville Railroad Company, said:

"Competition between carriers affects the circumstances and conditions, not with relation to the actual physical movement of the property, but with respect to the revenue that may be secured for such movement It is clear that the compensation that one carrier may secure for transportation, in competition with other carriers, is fixed by the lowest rate which any one of such carriers may perform the service for. This is true in competition of carriers by rail with those by water, and equally true as between two or more carriers by rail competing with each other." . . . . . "The existence of competition between markets is closely related to the competition between carriers, . . . and includes another term, now, and for many years, in general use in the consideration of transportation questions, namely, the competition of product with product, which has been stated to be the 'most potent factor of competition.'"

Transcript, pages 96–97–98–99.

Oscar G. Murray, who has been connected with the traffic department of the railroad service in the United States since 1872, and who is the Traffic Manager of the Chesapeake & Ohio R. R. Co. and the Cleveland, Cincinnati, Chicago & St. Louis R'y Co., said:

"Under such conditions, the carriers who can most economically handle the business fix the rates, and these have to be adopted by all in competition, if they so continue, regardless of the net results of that particular business to them." . . . .

"To a large extent, the existence of competition between markets affects the circumstances and conditions of the transportation of property, in the same manner as the existence of competition between carriers."

Transcript, pages 126 and 127.

W. H. Newman, who has been connected with the traffic department of the railroad service, in the United States, for twenty-three years, and who is now one of the Vice Presidents of the Chicago & Northwestern Railroad Co., said:

"At points where competition exists, as it always exists where there are two or more carriers seeking business to or from common points, or common territory, many elements enter into that competition, that may not only affect, but may alter, or absolutely control, the circumstances and conditions, under which the transportation of property is conducted. Distance—that is, rail mileage—while not dominating, must, and does, have a very important bearing in determining rates; hence, the 'short line,' or shortest rail route, between the common points, or the common territory, all else being equal, fixes the maximum rate that can be exacted by any of the rail carriers competing for the business in question." . . . . .

"Competition between markets affects the circumstances and conditions under which the transportation of property is conducted in various ways. For instance, the prices of grain are regulated and fixed in every portion of this country by the selling value in the markets of the old world." . . . . "The makers of agricultural implements in Ohio, Indiana, and Michigan compete in the grain fields and on the farms in Nebraska, Kansas, Missouri, and Texas, with like manufacturers in Illinois and Wisconsin. Unless the railroads from Illinois and Wisconsin can meet the rates made by the railroads from Michigan, Ohio, and Indiana, the Wisconsin and Illinois manufacturers would be deprived of a business which would contribute a large tonnage to the roads of those States; and while this traffic might pay but a low rate per ton per mile for its carriage, still it would pay a little more than the actual cost of the service, and the profit, small though it is, helps in supporting other industries on the Wiscon-

sin and Illinois roads, and in developing the country to which those roads afford transportation facilities. St. Louis competes with Chicago for the business of the Western States; Louisville with Cincinnati for that of the South, and so it is with many other points; and hence the rates from the several competing places cannot vary very largely.

"The rate fixed from the nearest point to the common market usually fixes the rate from the most distant competing point to that market."

Transcript, pages 105 and 106.

J. C. Stubbs, who has been connected with the traffic department of the railway service in the United States for twenty-three years, and who is one of the Vice Presidents of the Southern Pacific R. R. Co., said:

"Competition: This is probably the strongest influence affecting the charges for transportation, as it is in the regulation of prices for all other products of labor. It over-rides all other considerations, with carriers; it may be encountered in the person of a rival, contending for the carriage of the same goods, or it may be the contention of two producing territories for the same consuming market." . . . . "In both cases, the circumstances created by competition determine the rate of charge; and the rate of charge determines in what quantities the property can be moved, or whether it can be moved at all; and the actual cost to the carrier, as well as his profits, are affected by the volume of the traffic, whether it be more or less."

Transcript, pages 114 and 115.

E. B. Stahlman, who has been connected with the traffic department of the railroad service in the United states since 1864, and who is Commissioner of the Southern Railway and Steamship Association, said:

The circumstances and conditions which substantially affect the transportation of property by railroads, or other carriers, "are varied, and so far-reaching that it would be difficult to give them

in a brief answer. The rail carrier must consider" . . . . "the circumstances and conditions which surround the traffic at the point of shipment, as well as at the point of destination; whether or not the traffic offered is in competition with a rival line from the same point of shipment; whether or not the traffic is in competiton with a rival line from a rival market," etc.

Transcript, page 229.

J. M. Culp, who has been connected with the railroad traffic business about twenty-one years, and who is Assistant Traffic Manager of the Richmond & Danville R. R., stated as follows:

"Q. 3. State the most important circumstances and conditions which affect the transportation of property by railroads in the territory south of the Ohio and Potomac Rivers, and east of the Mississippi River?

"A. The cost of transportation service, the value of the transportation service, and competition of at least three kinds: 1st. The competition between carriers. 2d. The competition of one market with another, or others. 3d. The competition of product with another product that may be converted to the same use.

"Q. 4. What is meant by the cost of transportation service?

"A. The cost of transportation service may be said to be what it costs the carrier to perform that service.

"Q. 5. What is meant by the value of transportation service?

"A. By the value of transportation service, I mean its worth to the party for whom it is performed."

Transcript, page 150.

Edwin Fitzgerald, who has been connected with the traffic business in the United States since 1867, and who is Traffic Manager of the E. T., V. & G. R. R., said:

"The competition between carriers has a decided effect in establishing circumstances and conditions, and in no section of the United States does dissimilarity exist to such an extent as in the Southern and Southwestern States. The circumstances and conditions governing the construction and rate adjustment in this territory, is occasioned by water transportation, against which

rail lines compete, serving as it does, as the prime factor in fixing the rates. The water lines from the North Atlantic ports make the rates to the South Atlantic and Gulf ports. The rates of the steamer lines operating between such ports are controlled, in a large measure, by sailing vessel competition. This is notably so on the lower classes of freight. The large volume of traffic from the South Atlantic and Gulf ports in lumber, naval stores, etc., going East, afford to sailing vessels profitable return cargoes; consequently they carry the South-bound merchandise at very low rates. There are established sailing vessel packet lines operating from Eastern coast cities to the South Atlantic and Gulf ports. This competition affects the rates of the regular steamer lines, and thus these conditions fix the water line rates. To such rates as are made by the water lines, can be added the rates in Georgia, as fixed by the Georgia Commission, and the total rates thus made from Boston, New York, Philadelphia, Baltimore, etc., are the highest that can be obtained. Again, water competition of the rivers is a factor of controlling force; the boats on the Savannah River fix the rates that can be charged by the rail lines from Savannah to Augusta. The roads from Charleston, S. C., cannot allow Savannah to have a lower rate for substantially the same distance; consequently the Savannah River, though it does not reach Charleston at all, is the factor in establishing rates from Charleston to Augusta. At the rates thus adjusted from Eastern cities to Augusta, the longer lines, through Wilmington, Norfolk, Portsmouth, and West Point, must work; and so, also, must be the basis for the adjustment of the rates from all Eastern points, either by the rail or water lines, or by the all rail lines."

Transcript, pages 197 and 198.

"The competition between markets is of controlling force, as is also the competition as between product and product, and naturally affects the circumstances and conditions under which the transportation is conducted. To illustrate: The steamer lines from Eastern coast cities to Savannah, in connection with the lines from Savannah to Augusta, as I have endeavored to explain, fixes the total rates from such Eastern cities to Augusta.

It must be clear, therefore, that to enable Cincinnati to compete in the sale of such similar products as are produced in Cincinnati and at Eastern cities, there must be an adjustment of rates from Cincinnati to such points with reference to the rates from Eastern points. Otherwise competition would be destroyed as between markets, and the Eastern markets would enjoy the control of such business, and the lines from Cincinnati would be deprived of such traffic as they are now able to carry under a proper adjustment of rates."

Transcript, page 198.

Sol Haas, who has been connected with the traffic department of the railroad service in the United States since 1869, and who is Traffic Manager of the Richmond & Danville Railroad, said:

"Where competition exists it makes no difference whether it exists by rail or by water, or by rail and water, or by all combined. Wherever there is competition the circumstances and conditions are likely to be different." . . . .

"It is found necessary to recognize the existence of competition between markets. For example, the rate from Richmond, Va., on manufactured tobacco, to New Orleans, is controlled by the rates from Richmond to New York by water, and from New York to New Orleans also by water." . . . . "The value of oats in the grain-producing sections of the world has a fixed value in its relations to corn. Should the rates on either be made higher than the other, that product having the higher rate would have less commercial value at the point to which it is to be transported, and the transportation of that product having the higher rate would be entirely lost."

Transcript, page 143.

D. Miller, Traffic Manager of the Queen & Crescent Railroad, said:

"The rates from Cincinnati and other Western points to Augusta and Atlanta are controlled by competition from Eastern markets—that is, New York, Boston, Baltimore, etc. The rates from the latter points to Augusta and Atlanta are directly con-

trolled or fixed by the water carriers from those ports through Charleston and Savannah, thence by rail, or water via Savannah River. The through rates from New York and other Eastern markets are made by adding to the rates made by the steamships, New York, etc., to Charleston & Savannah, the rates of the carriers from the latter ports to Augusta and Atlanta; the rates of the rail lines from Savannah to Augusta and Atlanta being fixed by the Georgia State Railroad Commission. The rates, therefore, of the all-rail lines from New York, etc., to Atlanta and Augusta, are fixed by the water routes, over which they have no control, which they are compelled to meet, or abandon the business to the water carriers. Cincinnati, Louisville and other Western points seek to compete with New York and other Eastern cities for the trade of Atlanta, Augusta and adjacent territory. To do so successfully, it is obvious there must be a relative adjustment of rates that will permit Western shippers to deliver like commodities upon equal terms with Eastern shippers in the common markets of Augusta, Atlanta and the Southeast. The lines more directly interested in the traffic of Cincinnati and Western markets have, therefore, necessarily sought to make the rates from those points to Atlanta, Augusta, etc., upon this basis." . . .

"The Eastern cities are in direct competition with Cincinnati, Louisville, and Western markets for the trade of Augusta and the South, except, possibly, grain and meat products. Manufactured goods of all kinds, however, are produced in the East as well as the West, and the competition in such commodities, as between the East and the West, is direct and strong, making equalized rates necessary to possible competition in trade. There are five lines from the Eastern cities to Augusta, etc."

Transcript, pages 326 and 327.

P. J. McGovern, who has been connected with the traffic business for ten years, and who is Chief Clerk to the Traffic Manager of the Richmond & Danville Railroad, said:

"The existence of competition between carrier and carrier materially and vitally affects the circumstances and conditions under which the transportation of property is conducted. It compels carriers between given points to transport property by

longer or more circuitous routes, at rates which are the same as, or even less than, the rates fixed by shorter or more direct routes, or routes having the advantage of cheaper modes of transportation." . . . .

"The existence of competition between market and market affects the circumstances and conditions under which the transportation of property is conducted, even to a greater and more far-reaching extent than does competition between carrier and carrier."

Transcript, pages 170 and 171.

John B. Peck, who was connected with the traffic business from 1846 to 1889, stated as follows:

"Q. 6. Please explain fully how or in what respect, if at all, the existence of competition between carrier and carrier, affects the circumstances and conditions under which the transportation of property is conducted.

"A. In the early history of railroads, tariffs were made by increasing the rate with the distance. When freight was shipped over two or more roads, each charged its own rate, so that the through rate was the sum of the locals. Of course, all freight was shipped by the shortest and most direct line. Competition was begun by long lines competing with shorter lines; and the long lines, compelled to meet the rate of shorter lines between competitive points, adhered to their former local rates, because a reduction to the basis of competitive rates, the volume of through traffic being small as compared with the local, would involve a loss of revenue, instead of a gain, from the competitive traffic. The discrimination of charging more for a short than for a long distance, began with, and was the necessary result of, competition. In *thickly populated sections* of the country, the large number of railroads required to carry their traffice have made competitive points so frequent, that it is no longer practicable to charge higher rates to local than to competitive points, and the large volume of traffic enables those roads to earn a sufficient revenue on this basis. But as a rule, in the territory named in question 2 (i. e., the territory south of the Potomac and Ohio Rivers, and east of the Mississippi River), these conditions have

trolled or fixed by the water carriers from those ports through Charleston and Savannah, thence by rail, or water via Savannah River. The through rates from New York and other Eastern markets are made by adding to the rates made by the steamships, New York, etc., to Charleston & Savannah, the rates of the carriers from the latter ports to Augusta and Atlanta; the rates of the rail lines from Savannah to Augusta and Atlanta being fixed by the Georgia State Railroad Commission. The rates, therefore, of the all-rail lines from New York, etc., to Atlanta and Augusta, are fixed by the water routes, over which they have no control, which they are compelled to meet, or abandon the business to the water carriers. Cincinnati, Louisville and other Western points seek to compete with New York and other Eastern cities for the trade of Atlanta, Augusta and adjacent territory. To do so successfully, it is obvious there must be a relative adjustment of rates that will permit Western shippers to deliver like commodities upon equal terms with Eastern shippers in the common markets of Augusta, Atlanta and the Southeast. The lines more directly interested in the traffic of Cincinnati and Western markets have, therefore, necessarily sought to make the rates from those points to Atlanta, Augusta, etc., upon this basis." . . .

"The Eastern cities are in direct competition with Cincinnati, Louisville, and Western markets for the trade of Augusta and the South, except, possibly, grain and meat products. Manufactured goods of all kinds, however, are produced in the East as well as the West, and the competition in such commodities, as between the East and the West, is direct and strong, making equalized rates necessary to possible competition in trade. There are five lines from the Eastern cities to Augusta, etc."

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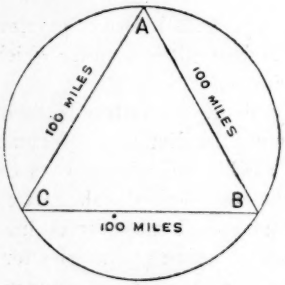
"A. In the early history of railroads, tariffs were made by increasing the rate with the distance. When freight was shipped over two or more roads, each charged its own rate, so that the through rate was the sum of the locals. Of course, all freight was shipped by the shortest and most direct line. Competition was begun by long lines competing with shorter lines; and the long lines, compelled to meet the rate of shorter lines between competitive points, adhered to their former local rates, because a reduction to the basis of competitive rates, the volume of through traffic being small as compared with the local, would involve a loss of revenue, instead of a gain, from the competitive traffic. The discrimination of charging more for a short than for a long distance, began with, and was the necessary result of, competition. In *thickly populated sections* of the country, the large number of railroads required to carry their traffice have made competitive points so frequent, that it is no longer practicable to charge higher rates to local than to competitive points, and the large volume of traffic enables those roads to earn a sufficient revenue on this basis. But as a rule, in the territory named in question 2 (i. e., the territory south of the Potomac and Ohio Rivers, and east of the Mississippi River), these conditions have

not yet obtained, and the distance between competitive points has enabled, and the smaller volume of business has compelled, the railroads in that section to adhere to the original policy of charging more in certain cases for short than for longer distances."

Transcript, pages 129 and 130.

Gen. E. P. Alexander, who was connected with the traffic department of different roads for nearly twenty-one years, said:

"Competition between two carriers lessens the reasonable rate which that carrier would otherwise obtain who is at a comparative disadvantage in the competition. I wish to illustrate by a simple diagram, or figure, as follows:



"Imagine three cities, A, B, and C, situated at the three angles of an equilateral triangle, each side being an independent railroad one hundred miles long; there will then be two ways to ship goods or to travel from A to B; first, direct one hundred miles via the A B Railroad; second, via the A C Railroad to C, and then via the C B to B, in all, two hundred miles. Now, it is plain that if the two roads, A C and C B, wish to compete for the travel and freight between A and B (and they always do), they cannot charge more for their round-about haul, than the direct route to A B charges. If A B charges $3 or 3 cents a mile, A C and C B must accept a cent and a half a mile; for the value of the service rendered is only $3; and via their route that value has to be spread over two hundred miles of road. Now, on the very same train, starting from A, may go two passengers; one is

going to stop at C; he properly pays $3, or 3 cents a mile, because it is worth $3 to get from A to C. The second is going through C to B; he properly pays but one and one-half cents a mile, for it is only worth $3 to take him all the way to B, no matter by what route he travels. The long route, therefore, is rendering that passenger a less service per mile. This figure illustrates in principle every case of competition between carriers. If, instead of a triangle, we draw a circle between the three points, A, B, and C, or any sort of closed line, the competition would be of the same character, and have the same effect. The only essential feature of the figure is, that there should be two routes from A to B.

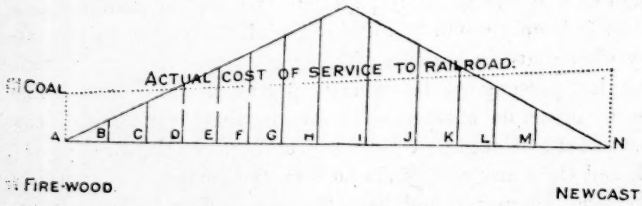
"Q. 6. What difference, if any, does it make where both carriers are rail carriers, or both of them water carriers, or one of them is a rail carrier and the other is a water carrier, so far as the effect of their competition is concerned?

"A. It makes no difference whatever, because all competition has the same effect of diminishing the value of the service rendered by the party having the longest or poorest route. The source of the competition has nothing to do with the case; it might be by balloon.

"Q. 7. Please explain fully how, or in what respect, the existence of competition *between markets or products* affects, if at all, the circumstances and conditions under which the transportation of property is conducted.

"A. Competition between markets and markets, or between product and product, both act as any other competition does, by virtue of their diminution of the value of service rendered. The principle underlying the whole matter is contained in the old proverb about 'carrying coals to Newcastle.' Newcastle being supposed to produce coal cheaper than any other place, the cost of carrying coal there from a distance may be very great, but the value of service rendered absolutely nothing. So, too, to carry coal to a point ten miles this side of Newcastle may be worth a small sum, while to stop it a hundred miles this side would be worth still more. The competition between products may be illustrated by supposing a man to ship fire-wood to Newcastle. He would find no grates there fitted to burn wood, and carrying

wood there might be even a poorer venture than carrying coal. I will illustrate by another diagram, as follows:



NOTE.—The dotted line indicating *cost of service* does not refer to the *average cost of all service*, but to the actual *extra* cost of hauling the particular business in question as compared with letting it alone. This, of course, is much less than the average cost of all business, as many fixed expenses would neither be increased or diminished by doing it or letting it alone. Diagram shows railroad cannot afford to handle the business *at all* between A and C, nor between L and Newcastle, but it would have profit on all between C and L. [Signed] E. P. ALEXANDER.

"Suppose a railroad starting from A runs due east with stations B, C, D, etc., down to N, which is Newcastle, and that a material part of the road's business is hauling firewood and coal produced at A. We have now a perfect illustration of the effect of competition of market with market, and of product with product. The value of the service rendered, and consequently the rate which may be charged for hauling coal and firewood from A toward Newcastle will increase gradually as we go east via B, C, and D, until we begin to meet the influence of the superfluity of coal at Newcastle coming west. Somewhere, say about H, the possible rate for both coal and firewood will reach a maximum, beyond which, as we go toward Newcastle, the possible rate to each station will grow less and less until it comes to zero at Newcastle. I illustrate on the diagram by vertical lines at each station representing the rate which may be charged."

Transcript, pages 84, 85, 86.

XIII.

The Competitive Circumstances and Conditions Which Prevail at Augusta, Ga.

Augusta is situated on the Savannah River, which is navigable for steamboats from the ocean, at the city of Savannah, to Augusta, usually, during the entire year.

The Central Railroad, from Savannah; the Port Royal & Augusta Railroad, from Port Royal, and the South Carolina Railroad, from Charleston, run from the seacoast to Augusta.

Several lines of steamships ply between Boston, New York, Philadelphia, and Baltimore, on the one side, and Charleston, Port Royal and Savannah, on the other.

The New York Central R. R., the Erie R. R., the Pennsylvania R. R., the Baltimore & Ohio R. R., and the Chesapeake & Ohio R. R., known as the trunk lines, run from Cincinnati, O., to Boston, New York, Philadelphia, and Baltimore.

Gen. Alexander was asked whether or not freights can, and have been carried from Cincinnati, via the rail lines just mentioned, to New York, Philadelphia, and Baltimore and Norfolk, and thence via ocean to Charleston and Savannah, and from Savannah by river to Augusta, at rates that materially affected the rates charged by transportation lines operating from Cincinnati, via Atlanta, to Augusta?

His answer was:

"Yes, freights are brought from many Western points, as far west even as Chicago, and often in considerable quantities, to New York, Baltimore and Philadelphia, thence by water to Charleston and Savannah, and thence into the interior by rail and water. There is one peculiar condition of transportation on the ocean which gives the competition by this route peculiar strength. All the sailing vessels and steamships plying from Southern ports north, have better cargoes bound north than

when coming south. Going north, they carry lumber, naval stores, cotton, etc. Now, the vessels at sea require a considerable loading for safety and stability, and the south-bound coasting trade rarely has enough freight to give them even all the ballast they would like to have, consequently they will take products from the West, bound to Southern ports, at any rate which will more than pay the cost of handling, as they really need the freight for ballast."

Transcript, page 88.

Among the lines which can, practically or potentially, compete for traffic between Cincinnati and Augusta, Mr. Haas and Mr. Miller mentioned "the trunk lines through the North Atlantic ports, thence by water through the South Atlantic ports."

Transcript, pages 143, 144, 325.

Upon the same point Mr. Fitzgerald said:

"The water lines from the North Atlantic ports make the rates to the South Atlantic and Gulf ports. The rates of the steamer lines operating between such ports are controlled, in a large measure, by sailing vessel competition. This is notably so on the lower classes of freight. The large volume of traffic from the South Atlantic and Gulf ports in lumber, naval stores, etc., going East, afford to sailing vessels profitable return cargoes, consequently they carry the south-bound merchandise at very low rates. There are established sailing vessel packet lines operating from Eastern coast cities to the South Atlantic and Gulf ports. This competition affects the rates of the regular steamer lines, and thus these conditions fix the water line rates. To such rates as are made by the water lines can be added the rates in Georgia as fixed by the Georgia Commission, and the total rates thus made from Boston, New York, Philadelphia, Baltimore, etc., are the highest that can be obtained. Again, water competition of the rivers is a factor of controlling force; the boats on the Savannah River fix the rates that can be charged by the rail lines from Savannah to Augusta."

Transcript, pages 197 and 198.

"Rates have been so adjusted at times by the trunk lines to the seaboard which have allowed combinations in connection with water lines from Baltimore, and possibly other Eastern seaboard cities, by which less rates have been made than the tariff rates then in effect by the lines from Cincinnati to Augusta through Atlanta."

Transcript, page 201.

Mr. Stahlman said:

"These vessels, steam and sail, ply between the ports of Boston, Providence, New York, Philadelphia, and Baltimore, and the ports of Charleston, Port Royal, Savannah, Brunswick, and Jacksonville. There are also vessels plying between the ports of Mobile, New Orleans, and New York, Philadelphia, Baltimore, and Boston. They bring traffic from the Eastern ports, from the interior New England States, from the West, as far west as Buffalo, Pittsburg, Parkersburg, and Salamanca, and to purely Southern coast points; they carry through the ports of Baltimore, Philadelphia, and New York, business from all points in the West, including Chicago, St. Louis, St. Paul, Minneapolis, Cincinnati, etc." Transcript, page 215. . . . . "It has been possible in the past to compete for business between Cincinnati and Augusta, via Baltimore and New York, in connection with vessels plying between New York, Baltimore, Charleston, and Savannah."

Transcript, page 232.

Mr. Miller said:

"Formerly the Baltimore & Ohio, and Chesapeake & Ohio, carried considerable business from Cincinnati through their Virginia Junctions, Baltimore, Newport News, via South Atlantic coast points, to Augusta and points near the coast. The movement at this time via those routes from Cincinnati proper is very small. There is, however, a large amount of business handled from Chicago and Northern points via these routes which directly affect our Cincinnati rates.

"Q. 6. In what manner does that business, or did it at the time of the making of this order, affect the Cincinnati rates?

Explain it. State in connection with this, whether the conditions affecting this traffic have been materially changed during the last eighteen months?

"A. The conditions affecting the rates to Atlanta and Augusta and contiguous territory are now the same as have existed for eighteen months or more past. The rates from Chicago, in connection with the steamer rates from any of the North Atlantic ports to Augusta, would have a direct influence as to the through rate either from Cincinnati, Chicago, or Western points."

Transcript, pages 326 and 327.

The steamship average rate, per 100 pounds, on first class freight, from New York to Brunswick, when the traffic originates at Western points, such as Detroit, Mich., Chicago, Ill., Cleveland or Cincinnati, Ohio, or other points in that territory, if destined to interior points, such as Augusta, etc., is from 24 to 30 cents.

Transcript, pages 322 and 323.

The rate from New York to Savannah is the same as to Brunswick; and from Savannah to Augusta, by river, upon a steady business, of full cargoes, made up of different classes of freight, in the usual proportions, a steamboat rate can be obtained of 30 cents per 100 pounds, on first class freight.

Transcript, page 320.

The following transportation lines actually, and actively, compete between Cincinnati and Augusta, viz.:

No. 1. Cincinnati, New Orleans & Texas Pacific Railway from Cincinnati to Chattanooga, thence via the East Tennessee, Virginia & Georgia Railway to Atlanta, thence via the Georgia Railroad to Augusta.

Transcript, pages 155–227.

No. 2. Cincinnati, New Orleans & Texas Pacific Railway from Cincinnati to Chattanooga, thence via the East Tennessee, Vir-

ginia & Georgia Railway to Atlanta, thence via the Central Railroad of Georgia to Augusta.

Transcript, pages 155, 156, 227.

No. 3. Cincinnati, New Orleans & Texas Pacific Railway from Cincinnati to Chattanooga, thence via the Western & Atlantic Railroad to Atlanta, thence via the Georgia Railroad to Augusta.

Transcript, pages 156–227.

No. 4. Cincinnati, New Orleans & Texas Pacific Railway from Cincinnati to Chattanooga, thence via the Western & Atlantic Railroad to Atlanta, thence via the Central Railroad of Georgia to Augusta.

Transcript, page 156.

No. 5. Cincinnati, New Orleans & Texas Pacific Railway from Cincinnati to Chattanooga, thence via the Central Railroad of Georgia to Kramer, Ga., thence via the Georgia Pacific to Atlanta, thence via the Georgia Railroad to Augusta.

Transcript, pages 156–227.

No. 6. Cincinnati, New Orleans & Texas Pacific Railway from Cincinnati to Chattanooga, thence via the Central Railroad of Georgia via Kramer, Newnan and Macon to Augusta.

Transcript, page 156.

Nos. 7, 8, 9, 10, 11 and 12 via the Louisville & Nashville Railroad from Cincinnati to Nashville, thence via the Nashville, Chattanooga & St. Louis Railway to Chattanooga, thence by the respective lines above named to Augusta.

Transcript, page 156.

No. 13. From Cincinnati to Harriman Junction via the Cincinnati, New Orleans & Texas Pacific Railway, thence to Paint

Rock via the East Tennessee, Virginia & Georgia Railway, thence to Augusta via the Richmond & Danville Railroad."

Transcript, pages 156 and 144.

The following additional transportation lines, while not actively competing, at the present moment, are quite available routes; and they are "potential" competitors between Cincinnati and Augusta. Competition has a "*potential*" existence, in the sense in which we wish to be here understood, where the means of such competition exist, and all the conditions are such that it is morally certain an advance in rates by a carrier will result in developing competition of controlling force.

5 I. C. C. Rep. 246; Raworth vs. N. P. R. R.

Said "*potential*" competitors are:

1. Ohio & Mississippi R. R., Cincinnati to Louisville; Newport News & Mississippi Valley R. R., Louisville to Memphis; Memphis & Charleston R. R., Memphis to Chattanooga; thence Chattanooga to Atlanta, via E. T., V. & G. R. R.; thence Atlanta to Augusta, via the Georgia R. R.

Transcript, pages 227, 228, 325, 143, 144.

2. Ohio & Mississippi R. R., Cincinnati to Louisville; Newport News & Mississippi Valley R. R., Louisville to Memphis; Memphis & Charleston R. R., Memphis to Chattanooga; thence Chattanooga to Atlanta, via W. & A. R. R.; thence Atlanta to Augusta, via the Georgia R. R.

Transcript, pages 227, 228, 325, 143, 144.

3. Ohio & Mississippi R. R., Cincinnati to Louisville; Newport News & Mississippi Valley R. R., Louisville to Memphis; Kansas City, Memphis & Birmingham R. R., Memphis to Birmingham; thence Birmingham to Atlanta, via the Georgia Pacific R. R.; thence Atlanta to Augusta, via the Georgia R. R.

Transcript, pages 227, 228, 325.

4. Ohio River steamers, Cincinnati to Memphis; thence Kansas City, Memphis & Birmingham R. R., to Birmingham; thence Birmingham to Atlanta, via the Georgia Pacific R. R.; thence Atlanta to Augusta, via the Georgia R. R.

Transcript, pages 227 and 144.

5. Ohio River steamers, Cincinnati to Memphis; Memphis & Charleston R. R., Memphis to Chattanooga: thence Chattanooga to Atlanta, via W. & A. R. R.; thence Atlanta to Augusta, via the Georgia R. R.

Transcript, pages 227, 144.

6. Ohio River steamers to Memphis; Memphis & Charleston R. R., from Memphis to Chattanooga; thence Chattanooga to Atlanta, via the E. T., V. & G. R. R.; thence Atlanta to Augusta, via the Georgia R. R.

Transcript, pages 227 and 144.

7. Ohio River steamers to Huntington, Miss.; thence Georgia Pacific R. R., from Huntington to Atlanta; thence Atlanta to Augusta, via the Georgia R. R.

Transcript, pages 227 and 144.

8. Louisville & Nashville R. R., Cincinnati to Jellico, thence via the E. T., V. & G. R. R. to Chattanooga, or Atlanta, and thence to Augusta.

Transcript, page 325.

9. Louisville & Nashville R. R., Cincinnati to Norton, Va., thence via Norfolk & Western R. R., and Richmond & Danville R. R., to Augusta.

Transcript, page 325.

10. Chesapeake & Ohio R. R., Cincinnati to Lynchburg, Va., thence via the Richmond & Danville R. R. to Augusta.

Transcript, pages 325 and 144.

11. The trunk lines through the North Atlantic ports, thence by water to the South Atlantic ports, thence by rail or river to Augusta.

Transcript, pages 144, 88, 197, 198, 232, 325, 326, 327.

Competent traffic experts testify that, considering the competitive circumstances and conditions which prevail at Augusta, the rate of $1.07 per 100 pounds, on first class freight, in less than car loads, from Cincinnati to Augusta, is a just and reasonable rate.

Transcript, pages 131, 156, 173, 228, 229, 237.

There was no complaint that the rate from Cincinnati to Augusta is *too high*: on the contrary, the complaint, in effect, was that said rate was *too low*: at least, as compared with the rates from Cincinnati to Atlanta, and Social Circle, respectively.

Transcript, pages 5 and 6.

Map No. 2 will show the competitive situation at Augusta, as proven by the testimony in this case.

XIV.

The Competitive Circumstances and Conditions Which Prevail at Atlanta, Ga.

The following transportation lines actually and actively compete between Cincinnati and Atlanta, viz.:

No. 1. The Cincinnati, New Orleans & Texas Pacific Railway, from Cincinnati to Chattanooga, thence via the East Tennessee, Virginia & Georgia Railway to Atlanta.

Transcript, pages 154, 199, 226.

No. 2. The Cincinnati, New Orleans & Texas Pacific Railway, from Cincinnati to Chattanooga, thence via the Western & Atlantic to Atlanta.

Transcript, pages 154, 199, 226.

No. 3. The Cincinnati, New Orleans & Texas Pacific Railway from Cincinnati to Chattanooga, thence via the Central Railroad of Georgia to Kramer, Ga., thence by the Georgia Pacific Railway to Atlanta.

Transcript, pages 154, 199, 226, 227.

No. 4. The Louisville & Nashville Railroad from Cincinnati to Nashville, thence via the Nashville, Chattanooga & St. Louis Railway to Chattanooga, thence via the Western & Atlantic R. R. to Atlanta.

Transcript, pages 154, 199, 226, 325.

No. 5. The Louisville & Nashville Railroad from Cincinnati to Nashville, thence via the Nashville, Chattanooga & St. Louis Railway to Chattanooga, thence via the East Tennessee, Virginia & Georgia Railway to Atlanta.

Transcript, pages 154, 199, 226, 325.

No. 6. The Louisville & Nashville R. R. from Cincinnati to Nashville, thence via the Nashville, Chattanooga & St. Louis Railway to Chattanooga, thence via the Central R. R. of Georgia to Kramer, Ga., thence by the Georgia Pacific Railway to Atlanta.

Transcript, pages 154, 199, 226, 227, 325.

No. 7. The Louisville & Nashville R. R. from Cincinnati to Jellico, thence via the E. T., V. & G. R. R. to Atlanta.

Transcript, pages 199 and 325.

The following additional transportation lines, while not actively competing at the present moment, are quite available routes; and they are "*potential*" competitors between Cincinnati and Atlanta, in the sense in which the word "*potential*" was defined in the last section:

1. Ohio & Mississippi R. R., Cincinnati to Louisville; New-

port News & Mississippi Valley R. R., Louisville to Memphis; Memphis & Charleston R. R., Memphis to Chattanooga; thence Chattanooga to Atlanta via the E. T., V. & G. R. R.

Transcript, pages 226, 144, 325.

2. Ohio & Mississippi R. R., Cincinnati to Louisville; Newport News & Mississippi Valley R. R., Louisville to Memphis; Memphis & Charleston R. R., Memphis to Chattanooga; thence Chattanooga to Atlanta via W. & A. R. R.

Transcript, pages 226, 144, 325.

3. Ohio & Mississippi R. R., Cincinnati to Louisville; Newport News & Mississippi Valley R. R., Louisville to Memphis; Kansas City, Memphis & Birmingham, R. R., Memphis to Birmingham; thence Birmingham to Atlanta via the Georgia Pacific R. R.

Transcript, pages 226, 144, 325.

4. Ohio River steamers, Cincinnati to Memphis; thence Kansas City, Memphis & Birmingham R. R. to Birmingham; thence Birmingham to Atlanta, via the Georgia Pacific R. R.

Transcript, pages 226 and 144.

5. Ohio River steamers, Cincinnati to Memphis; Memphis & Charleston R. R., Memphis to Chattanooga; thence Chattanooga to Atlanta, via W. & A. R. R.

Transcript, pages 226 and 144.

6. Ohio River steamers to Memphis; Memphis & Charleston R. R., from Memphis to Chattanooga; thence Chattanooga to Atlanta, via the E. T., V. & G. R. R.

Transcript, pages 226 and 144.

7. Ohio River steamers to Huntington, Miss.; thence Georgia Pacific R. R., from Huntington to Atlanta, Ga.

Transcript, page 226.

8. The Pennsylvania R. R., Cincinnati to Alexandria; thence via Richmond & Danville R. R., to Atlanta.

Transcript, page 144.

9. The Baltimore & Ohio R. R., Cincinnati through Strausburg; thence via Richmond & Danville R. R. to Atlanta.

Transcript, page 144.

10. The Chesapeake & Ohio R. R., Cincinnati to Lynchburg; thence via Richmond & Danville R. R. to Atlanta.

Transcript, pages 144, 155, 325.

11. The Louisville & Nashville R. R., Cincinnati to Norton, Va.; thence via Norfolk & Western R. R. and Richmond & Danville R. R., to Atlanta.

Transcript, page 325.

12. The Trunk lines through the North Atlantic ports; thence by water to the South Atlantic ports; thence by rail to Atlanta.

Transcript, pages 144, 325, 88, 197, 198.

The rate of $1.07 per one hundred pounds on first class goods, in less than car loads, from Cincinnati to Atlanta, is a rate established by active and severe competition.

It has been in effect for about eight years; and is less than the rate previously in effect.

Transcript, pages 172, 130, 154, 199.

It has been generally satisfactory to the public.

Transcript, pages 173, 130, 199.

It corresponds with the rates charged from other points to Atlanta, under substantially similar circumstances and conditions.

Transcript, pages 172, 173, 154.

It was arrived at after years of experience; and by traffic ex-

perts who had devoted time and thought to the circumstances surrounding the traffic.

Transcript, pages 172, 173.

It is low enough not only to permit, but to greatly encourage and promote traffic, between Cincinnati and Atlanta.

Transcript, pages 172, 173, 154.

It is lower than the rates that would be charged by wagons, or by any other mode of land transportation ever known.

Transcript, pages 154, 129, 277.

Competent traffic experts testify that considering the competitive circumstances and conditions which prevail at Atlanta, the rate is just and reasonable.

Transcript, pages 172, 173, 130, 154, 193, 199, 228.

Map No. 1 will show the competitive situation at Atlanta, as proven by the testimony in this case.

XV.

Assignment of Errors.

The Cincinnati, New Orleans & Texas Pacific Railway Company, the Western & Atlantic Railroad Company, the Louisville & Nashville Railroad Company, and the Central Railroad & Banking Company of Georgia, (said two last named Companies being sued by the name of the Georgia Railroad Company), say that in the above mentioned decree, rendered by said Circuit Court of Appeals, and in the record and proceedings in said Court, in this cause, there is manifest error in this, to wit:

First: That said Circuit Court of Appeals erred, in annulling, avoiding, and reversing the decree rendered in this cause on June

5, 1893, by the Circuit Court of the United States for the Northern District of Georgia.

Second: That said Circuit Court of Appeals erred, in remanding this cause to said Circuit Court for the Northern District of Georgia.

Third: That said Circuit Court of Appeals erred, in instructing said Circuit Court for the Northern District of Georgia to enter a decree in favor of Complainant, the Interstate Commerce Commission, and against the Defendants, the Cincinnati, New Orleans & Texas Pacific Railway Company, the Western & Atlantic Railroad Company, and the Georgia Railroad Company, commanding and restraining the said Defendants, their officers, servants, and attorneys, to cease and desist from making any greater charge, in the aggregate, on buggies, carriages, and on other freight of the first class carried in less than car loads from Cincinnati to Social Circle, than they charge on such freight from Cincinnati to Augusta; that they so desist within five days after the entry of the decree; and, in case they or any of them shall fail to obey said order, condemning said Defendants, and each of them, to pay $100 a day, for every day thereafter they shall so fail.

Fourth: That said Circuit Court of Appeals erred, in decreeing that the said Cincinnati, New Orleans & Texas Pacific Railway Company, the Western & Atlantic Railroad Company, and the Georgia Railroad Company, be condemned *in solido* to pay the costs of this cause in said Circuit Court of Appeals.

Fifth: That said Circuit Court of Appeals erred, in not affirming said decree rendered in this cause June 5, 1893, by said Circuit Court for the Northern District of Georgia.

Sixth: That said Circuit Court of Appeals erred, because it failed to adjudge and decree that the matters of equity alleged in the bill filed in this cause are fully denied in the answers, and are not sustained by the proof, and that said bill be dismissed.

Seventh: Said Circuit Court of Appeals erred, because it, in effect, decided that said above named Defendants are under a common control, management or arrangement, for continuous carriage or shipment, and are engaged in the transportation of passengers, and property, wholly by railroad, between Cincinnati, O., and Social Circle, Ga.

Eighth: That said Circuit Court of Appeals erred, because it, in effect, decided that the rates charged by the above named Defendants for the transportation of buggies, carriages, and other freight of the first class carried by them, in less than carloads, from Cincinnati, O., to Social Circle, Ga., are unjust and unreasonable.

Ninth: That said Circuit Court of Appeals erred, because it, in effect, decided that the transportation of buggies, carriages, and other freight of the first class, carried by the above named Defendants, in less than car loads, from Cincinnati, O., to Social Circle, Ga., is a like and contemporaneous service, under substantially similar circumstances and conditions, with the transportation of buggies, carriages, and other freight of the first class, carried by the above named Defendants, in less than car loads, from Cincinnati, O., to Augusta, Ga.

Tenth: That said Circuit Court of Appeals erred, because it, in effect, decided that as the above named Defendants make a greater charge in the aggregate, on buggies, carriages, and other freight of the first class carried by them, in less than car loads, from Cincinnati, O., to Social Circle, Ga., than they make on such freight from Cincinnati, O., to Augusta, Ga., they thereby give to Augusta, Ga., and its traffic, an undue or unreasonable preference or advantage, and subject Social Circle, Ga., and its traffic, to an undue or unreasonable prejudice or disadvantage.

Eleventh: That said Circuit Court of Appeals erred, because it, in effect, decided that the transportation by the above named Defendants of buggies, carriages, and other freight of the first class

carried by them, in less than car loads, from Cincinnati, O., to Social Circle, Ga., is transportation conducted under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line, in the same direction, the shorter being included within the longer distance, as compared with the transportation by the above named Defendants of buggies, carriages, and other freight of the first class, carried by them, in less than car loads, from Cincinnati, O., to Augusta, Ga.

Twelfth: That said Circuit Court of Appeals erred, because it, in effect, decided that all of the above named Defendants join in the transportation of buggies, carriages, and other freight of the first class, in less than car loads, from Cincinnati, O., to Social Circle, Ga.; whereas the Defendants, the Cincinnati, New Orleans & Texas Pacific Railway Company, and the Western & Atlantic Railroad Company, alone join in the carriage of such freight from Cincinnati, O., to Atlanta, Ga.; and the Defendants, the Louisville & Nashville Railroad Company, and the Central Railroad and Banking Company of Georgia (who are sued as the Georgia Railroad Company), alone carry such freight from Atlanta to Social Circle, Ga.

Thirteenth: That said Circuit Court of Appeals erred, because it, in effect, decided that buggies, carriages, and other freight of the first class, carried by the above named Defendants, in less than car loads, from Cincinnati, O., to Social Circle, Ga., are carried over the same line, as similar freights carried by the above named Defendants from Cincinnati, O., to Augusta, Ga.

Wherefore the above named defendants pray that said decree of said United States Circuit Court of Appeals for the Fifth Circuit be reversed, and that said court be ordered to enter a decree affirming the said decree rendered on the 5th day of June, 1893, in the above entitled cause, by said Circuit Court of the United States for the Northern District of Georgia.

ARGUMENT.

XVI.

The First Section of the Act to Regulate Commerce.

The first section enacts that "All charges made for any service rendered or to be rendered, in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be *reasonable and just;* and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

24 U. S. Stat. At Large, page 279.

Mr. Justice Brown, in delivering the opinion of this court, in the case of the Interstate Commerce Commission vs. B. & O. R. R., said: "That a charge may be perfectly reasonable under Section 1, and yet may create an unjust discrimination, or an unreasonable preference, under sections 2 and 3."

145 U. S. 277, *I. C. C.* vs. *B. & O. R. R.*

We will hereinafter consider the question as to whether the rates in controversy in this case create an unjust discrimination under Section 2, or an unreasonable preference under Section 3; but for the present we shall confine ourselves to the question as to whether said rates are "reasonable," *in and of themselves.*

XVII.

Elements to be Considered in Determining Whether a Rate Is Reasonable, in and of Itself.

It has been said that "what is a reasonable sum for transportation of goods on the great railroad lines of the country in a

given case is often a complex question, into which enters many elements and considerations, and is incapable of exact solution."

100 N. Y., 402, *Kellmer* vs. *N. Y. C. & H. R. R. R.*

Ames et al. vs. *U. P. Ry. Co. et al.*, Pamphlet Opinions, page 15.

A rate should be reasonable from the shipper's standpoint; and it should also be reasonable from the carrier's standpoint.

As said by Mr. Justice Brewer, "The foundation of the idea of reasonableness is justice. That which is unjust cannot be reasonable; and when the strong arm of the Legislature is laid upon property invested in railroad transportation, it must be so laid as to do justice to such investor. There can be no justice in that which works to such investors a practical destruction of their property thus invested."

Ames et al. vs. *U. P. Ry. Co. et al.*, Pamphlet Opinion, pages 20, 19, 22.

"Justice demands that every one should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others."

154 U. S., page 412, *Reagan* vs. *Farmers' Loan & Trust Co.*

XVIII.

The Effect of the Reduction in Rates Ordered by the Commission Upon the Revenue of the Ge r-gia Railroad.

First: While the order of the Commission is technically confined to a reduction of the rate on first class freight from Cincinnati to Social Circle, the practical effect of the order is to require the Georgia Railroad to reduce all of its local rates, to and from all of its local stations, so that they shall, in no case,

exceed the proportions which that road receives from through rates charged upon traffic passing over its road.

A careful examination and accurate calculation prove that, if all the local freight had been hauled at proportions of through rates, the amount of revenue which the Georgia Railroad received under the rates which were charged during the year ending June 30, 1891, would have been reduced $418,245.

Transcript, pages 283 and 285.

The total revenue received by the Georgia Railroad from local, and through freight, during the year was $1,281,277.

Transcript, page 282.

We see, then, that to require the Georgia Railroad to reduce all of its local rates, to its proportions of through rates, would inflict a loss upon that road equal to about one-third of its total freight revenue.

The net earnings of the Georgia Railroad for the ten years and three months ending June 30, 1891, amounted to $4,952,029.20; or an average during that period of $483,124.80 per annum.

Transcript, page 285.

Now, if we deduct the loss of $418,245, which would result from reducing the local rates, to the proportions of through rates, the net earnings of the Georgia Railroad would be reduced to $64,879.80 per annum.

The net earnings above referred to represent 307 miles of road.

Transcript, page 285.

The construction account of the Georgia Railroad was closed many years ago, and the amount charged up to the cost of the road and its equipment is $5,430,000; but the road could not be duplicated at the present time, for less than $25,000 per mile, in-

cluding its terminals and equipment; which would place the present value of the road at $7,675,000.

Transcript, page 293.

Assuming the present value of the road to be only $6,500,000; it will be seen that $64,879.80 of annual net earnings would pay an interest of less than 1 per cent. per annum on the present value of the road.

The Georgia Railroad has been managed intelligently, economically and honestly.

Transcript, pages 134 and 293.

There is no suspicion of watered stock, or fraudulently issued bonds; nor is it intimated that extravagant salaries have been paid to officers, or others.

The Georgia Railroad is operated by the Louisville & Nashville Railroad Company, and the Central Railroad & Banking Company of Georgia as Assignees of the Lessee. Under the terms of the lease, said Assignees pay to the Georgia Railroad & Banking Company the sum of $600,000 per annum. During the period of the first ten years and three months, ending June 30, 1891, after receiving the net earnings, and also certain dividends, etc., from subsidiary roads, and after paying to the Lessor the rental due for the above period, said Assignees suffered a loss from the operations of the Georgia Railroad of $365,800.60. Besides the above loss, the Assignees expended in improvements, advances, etc., the sum of $370,842.56, which amount, added to the excess of rental over net income, shows a total amount advanced by the Assignees, in excess of cash received, for the first ten years and three months, the sum of $736,643.16; which represents a total loss of that amount, sustained by the Assignees, by the operations of the Georgia Railroad, during that period.

Transcript, pages 286, 287.

It is earnestly insisted that under the circumstances above set forth, the reduction ordered by the Commission, which, as we have shown, will amount to $418,245 per annum, will result in forcing the Assignees to accept rates that are unjustly and unreasonably low.

Second: It is shown in the record, that while the "ton mileage" of the Georgia Railroad has increased from 15,128,370 in 1866, to 90,370,108 in 1891, the "average rate per ton per mile" has, during the same period, decreased from 5.04 cents in 1866, to 1.49 cents in 1891. In other words, while the Georgia Railroad rendered freight service to the public in 1891, six times as great as the service rendered in 1866, the rate of compensation received in 1891 was only about one-fourth the rate received in 1866.

Transcript, page 318.

With the burdens imposed upon it as a carrier constantly increasing, and its rate of compensation for the service rendered constantly decreasing, and with the loss of $736,643.16, which the Assignees have already sustained in the operations of the road, it is earnestly insisted that the further reduction of earnings, of $418,245 per annum, as ordered by the Commission, is unjust and unreasonable.

XIX.

The Rate From Cincinnati to Atlanta is Just and Reasonable, in and of Itself.

First: The established through rate of the C., N. O. & T. P. Ry., on first class freight, when shipped from Cincinnati, destined to stop at Chattanooga, is 76 cents per hundred pounds. The established through rate of the W. & A. R. R., on first class

freight, when shipped from Chattanooga, destined to stop at Atlanta, is 57 cents per hundred pounds.

Transcript, page 15.

The sum of those two through rates would make a total rate from Cincinnati to Atlanta of $1.32 per hundred pounds; and those two companies would certainly charge that rate from Cincinnati to Atlanta, were it not that competition forces them to accept a joint through rate from Cincinnati to Atlanta, of only $1.07 per hundred pounds.

In other words, competition forces them to accept a *joint* through rate which is 26 cents per hundred pounds less than the sum of their respective separate through rates.

The fact that a rate is the result of active competition, is, of itself, evidence that it is a reasonably low rate.

Second: It has been said that "where freight has been carried for a long course of years, at schedule price, the shipper making no objection, and no inquiry as to the reasonableness of the charge, and when it was to his interest to object if the charge is unreasonable, it may be fairly presumed that the rate was reasonable."

100 N. Y., 402, *Kellmer* vs. *N. Y. C. & H. R. R. R.*.

The first class rate of $1.07 from Cincinnati to Atlanta, with the exception of a very short time, if any, has been in effect for about eight years; and no shipper has ever complained that the rate was not reasonable *in and of itself*.

Transcript, pages 172, 173, 130, 154, 228 and 234.

The traffic has been moved to the satisfaction of shippers and consignees, and the business community is entirely satisfied that the rate is reasonable, *in and of itself*.

It is true that complaints have been made that the rate from Cincinnati was too high as compared with the rates to Atlanta

from other cities which compete with Cincinnati in the Atlanta market; but no complaint has been made that the rate is unreasonable *in and of itself*.

Transcript, pages 172, 173, 221, 222, 233, 234 and 235.

Third: The James & Mayer Buggy Company, who originated this controversy, did not claim before the Commission that the rate from Cincinnati to Atlanta was unreasonable *in and of itself*. The only complaint was that said company ought not to be compelled to pay the same rate when shipping from Cincinnati to Atlanta, as when shipping to Augusta, a point 171 miles further distant than Atlanta, from Cincinnati.

Fourth: Mr. James, the President of said company, in his deposition in this case, refers to a map having a circle drawn upon it, with Cincinnati as a centre, and the distance from Cincinnati to Atlanta as a radius; and he states that there is no point in the circle to which he pays "*more* than $1.07," unless it be to Charlotte, N. C. He admits, however, that he is "speaking generally;" and that he is not thoroughly familiar with the rates to all the points in the circle.

Transcript, page 384.

The circle includes a large territory north of the Ohio River, extending from near Harrisburg, Pa., to Davenport, Iowa. The railroad traffic in that territory is very much larger; and the carriers in that territory can afford to accept lower rates than carriers in the territory between Cincinnati and Atlanta.

Comparison between the rates charged in different States are of little value, unless all of the elements that enter into the problem are presented.

Ames et al. vs. *U. P. R'y Co. et al.*, Pamphlet Opinions, page 37.

Fifth: The present rate of $1:07 per hundred pounds on first

class freight, from Cincinnati to Atlanta, is less than the rate previously in effect. In 1879 it was $1.39; in 1880 it was reduced to $1.10; and, about 1884, it was reduced to $1.07.

Transcript, pages 234 and 172.

Sixth: The present rate was arrived at after years of experience; and by traffic experts who had devoted time and thought to the circumstances surrounding the traffic.

Transcript, page 173.

Seventh: It is sufficiently low to not only permit, but to greatly encourage and promote traffic between Cincinnati and Atlanta.

Transcript, pages 173 and 154.

Eighth: It is lower than the rates that would be charged by wagon, or by any other known mode of land transportation.

Transcript, pages 154, 129, 277.

Ninth: Competent traffic experts testify that, considering the competitive circumstances and conditions which prevail between Cincinnati and Atlanta, the rate is just and reasonable.

Transcript, pages 172, 173, 130, 154, 199, 228, 144.

XX.

The Rate from Atlanta to Social Circle is Just and Reasonable, in and of Itself.

First: An Act of the General Assembly of Georgia, approved October 14, 1879, provided for the appointment of Railroad Commissioners, and authorized and required them to make for each of the railroad corporations, doing business in that State, "a schedule of just and reasonable rates of charges for the trans-

portation of passengers and freights and cars on each of said railroads." It further provided that said schedule shall be deemed and taken in all the courts of that State, "as sufficient evidence that the rates therein fixed are just and reasonable rates of charges for the transportation of passengers and freights and cars upon the railroads."

Transcript, page 263.

Said statute was construed by this Court in a case in which the Georgia Railroad & Banking Company was a party, and it was held "that the Legislature of a State has the power to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits, in the absence of any provision in the charter of the company constituting a contract vesting in it authority over those matters, subject to the limitation that the carriage is not required without reward, or upon conditions amounting to the taking of property for public use without just compensation; and that what is done does not amount to a regulation of foreign or interstate commerce."

128 U. S., 179, *Georgia Banking Co.* vs. *Smith.*

The Railroad Commissioners of Georgia, on August 15, 1888, issued Circular No. 119, known as the "Commissioners' Standard Freight Tariff," to take effect September 15, 1888, and to be observed by all railroad companies doing business in that State. In said tariff, for distances between 50 and 55 miles, a rate of 30 cents per hundred pounds is allowed by the Commissioners to be charged on first class freight.

Transcript, pages 259, 271 and 273.

Social Circle is a local station on the Georgia Railroad, 52 miles east of Atlanta.

"Local freight tariff No. 15," of the Georgia Railroad Company, taking effect January 1, 1891, was made in strict conform-

ity with the "Commissioners' Standard Freight Tariff;" and it charges a rate of 30 cents per hundred pounds, on first class freight, from Atlanta to Social Circle.

Transcript, page 294, (inset), and page 275.

The transportation from Atlanta to Social Circle, as well as the transportation from Atlanta to Augusta, is conducted exclusively within the limits of the State of Georgia.

The Legislature of that State, as held by this Court, in the case last cited, had the power to prescribe the charges of the Georgia Railroad Company for the carriage of persons and merchandise within the limits of that State; and the Railroad Commissioners, appointed by direction of the Legislature of that State, having allowed a rate of 30 cents per hundred pounds, on first class freight, from Atlanta to Social Circle, their action is "sufficient evidence" that said rate is just and reasonable.

If it be argued that the action of the State of Georgia in prescribing the charges which the railroad companies of that State may make for transportation within its limits, amounts to "a regulation of foreign or interstate commerce," it is sufficient to reply, in the language of Mr. Justice Brewer, that "the statute of the State does not work a change in interstate rates, any more than an Act of Congress prescribing interstate rates would legally work a change in local rates."

Ames et al. vs. *U. P. Ry. Co. et al.;* Pamphlet Opinions, page 12.

Second: The rate of 30 cents per hundred pounds on first class freight from Atlanta to Social Circle is 70 cents per hundred pounds less than the rates charged by wagons; or, to state it in another form, it is less than one-third of the wagon rate; which is the only other mode of transportation practicable between those points.

Transcript, pages 129, 277.

It will be time enough for counsel to sneer at a comparison of railroad rates with wagon rates, when some species of land transportation, whose rates are less than wagon rates, can be suggested by them.

Third: The "Commissioners' Standard Freight Tariff" of Georgia was adopted for the government of all the railroads of that State; and it allows a rate of 30 cents per hundred pounds on first class freight for 52 miles of railroad transportation, upon any of the railroads of that State.

The rate on first class freight charged by the Georgia Railroad from Atlanta to Social Circle is, therefore, just and reasonable, as compared not only with the wagon rates, but with the rates charged by all other railroads in Georgia, for the transportation of similar freight a similar distance.

Fourth: Competent railroad experts testify that the rate of 30 cents per hundred pounds on first class freight, in less than car loads, from Atlanta to Social Circle, is not more than a reasonable rate.

Transcript, pages 156, 157, 199, 144, 174, 131.

Fifth: The James & Mayer Buggy Company did not complain that the rate of 30 cents per hundred pound on first class freight from Atlanta to Social Circle was unreasonable, in and of itself. The only complaint was, that, in shipping to Social Circle, said Company ought not to be compelled to pay a higher rate, than when shipping to Augusta, a point 120 miles (more or less) further distant than Social Circle, from Cincinnati.

Transcript, page 6.

In fact, it is not shown in the record that any one has ever, at any time, complained of the rate from Atlanta to Social Circle, as being unreasonably high, in and of itself.

XXI.

The Rate from Cincinnati to Social Circle is Just and Reasonable, in and of Itself.

We have heretofore shown that the rate from Cincinnati to Social Circle is what is known as a "*combination* rate;" and that it is made by adding the joint through rate charged by the C., N. O. & T. P. R'y. and the W. & A. R. R. for transportation from Cincinnati to Atlanta, to the local rate charged by the Georgia Railroad for transpotation from Atlanta to Social Circle.

We have shown in section XIX that the joint through rate from Cincinnati to Atlanta is just and reasonable, in and of itself; and we have shown in Section XX that the local rate from Atlanta to Social Circle is just and reasonable, in and of itself. It necessarily follows that the combination rate from Cincinnati to Social Circle, which is the sum of those two reasonable rates, must, itself, be a reasonable rate.

XXII.

The Second Section of the Act to Regulate Commerce.

Section 90 of the English "Railways Clauses Consolidation Act (1845)," known as the "Equality Clause," is the model from which the second section of the Act to regulate commerce, was adapted.

For the convenience of the Court the English "Equality Clause," and the second section of the Act to regulate commerce are here published in parallel columns.

EQUALITY CLAUSE.

English Act.

SEC. 90. Railway clauses act 1845.

"And whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favoring particular parties, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular parties; it shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special act contained, from time to time to alter or vary the tolls by the special act authorized to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit; *provided*, that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, *passing only over the same portion of the line of railway under the same circumstances;* and no reduction or advance in any such tolls shall be made either directly or indirectly in favor of or against any particular company or person traveling upon or using the railway."—*Second Annual Rep. I. C. C.* (1888), *page* 89.

UNJUST DISCRIMINATION CLAUSE

American Act.

SEC. 2. Act to regulate commerce, 1887.

"That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensasation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic *under substantially similar circumstances and conditions*, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."—24 *U. S. Stat. at Large, pages* 379 *and* 380.

It will be noticed that the words "passing only over the same portion of the line of railway," to be found in the English Act, are not to be found in our Act.

The English Court of Appeals, in 1884, per Lindley, L. J.,

said: "The expression, 'passing *only* over the same portion of the line' appears to us to mean *passing between the same points of departure and arrival, and passing over no other part of the line.*"

4 Railway & Canal Traffic Cases, p. 452, *M. S. & L. Ry. Co.* vs *The Denaby Main Colliery Co.*

4 Railway & Canal Traffic Cases, p. 460, *Murray* vs. *G. & S. W. Ry. Co.*

6 Railway and Canal Traffic Cases, p. 141, *The Denaby Main Colliery Co.* vs. *The M. S. & L. Ry. Co.*

Law Rep. 21, Q. B. (1888), pp. 217, 218, *L. & Y. Ry. Co.* vs. *Greenwood.*

Counsel for the Commission, in the Court below, relied upon the English Cases of the Railway Company vs. Sutton; Evershed's Case; and the Denaby Main Colliery Co. Case, as holding that the words, "under the same circumstances," used in the English "Equality Clause," apply *alone* to the "circumstances o *the carriage;*" that goods are carried under "like circumstances" where *the rate of speed, risk, and expense of carriage are the same;* and that competition cannot be regarded as a "circumstance" within the meaning of the English "Equality Clause." In other words, counsel relied upon those cases as sustaining so much of the decision of the Commission in this case, as held, in effect, that the words "circumstances and conditions" as used in our Act "must have relation *to the nature and character of the service rendered by the carrier;*" and must be such as affect "the cost of transportation."

The English "Equality Clause" had no application where the freight of one shipper, though carried over the same line, was carried a greater distance from a common point of departure, than the freight of another shipper. In such a case, the freight carried the greater distance would pass over the same portion of the line as the freight carried the lesser distance; but the freight

carried the greater distance would also pass over an additional portion of the line; and, therefore, the two shipments would not pass "*only* over the same portion of the line."

Law Rep. 21, Q. B. (1888), pages 217 and 218.

As the English "Equality Clause" only applied to traffic "passing between the *same* points of departure and arrival," it is manifest that the question as to the effect of a substantial dissimilarity in the competitive conditions which might prevail at *different* points of *departure*, or at *different* points of *arrival*, could not possibly arise under that clause.

Suppose the line A to B represent a railroad.



Suppose two or more shipments of freight, of the same class or description, to be made from A to B; the English "Equality Clause" would apply; because the shipments would pass only over the same portion of the line, from the same point of departure, to the same point of arrival.

If the railroad A B has no competition, there will be no limit to the rates which it can charge, except that they be reasonable, in and of themselves, and not higher than the traffic can afford to pay. Such non-competitive rates must, however, be charged equally to all persons on all goods, of the same description, passing from A to B, "under the same circumstances."

If, however, there be other lines which compete with the railroad A B, and, in consequence thereof, it be forced to accept competitive rates, which are lower than it might otherwise reasonably charge; still, if it accept such competitive rates from one person shipping from A to B, it must accept from all other persons shipping from A to B, the same competitive rates, equally, in respect of all goods, of the same description, passing from A to B, under the same circumstances.

It was, therefore, said, in some of the English cases, that the

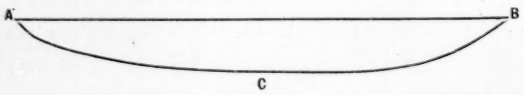
word "circumstances," as used in the English "Equality Clause," did not refer to competitive conditions; *where the points of departure and arrival were the same.* The reason was that whatever competition might exist in such a case, it necessarily affected all shippers, equally, where they shipped the same class of goods, *between the same points of departure and arrival.*

It was also said, in the same English cases, and for the same reason, that the words "under the same circumstances," *as used in the English "Equality Clause,"* apply alone to the circumstances of "the carriage;" and that goods are carried under "like circumstances," whenever the rate of speed, risk, and expense of carriage are the same.

One of the errors of the Commission in this case, resulted from the fact that it applied to the second, third, and fourth sections of the Act to regulate Commerce, a construction which some of the English courts had applied to their "*Equality Clause;*" the Commission overlooking the fact that the English "Equality clause" did not affect any shipments, except such as passed *only over the same portion of the line, from the same point of departure, to the same point of arrival.*

Referring again to the above diagram: Suppose one shipment to be made from A to B, and another shipment to be made in the opposite direction, from B to A, the English "Equality Clause" would *not* apply; even though the goods be of the same description, and pass only over the same portion of the line. The reason why the "Equality Clause" would not apply, is, that the points of departure, as well as the points of arrival, would be different. Certain competitive conditions might govern traffic passing from A to B, which would be substantially dissimilar from those governing traffic passing, in the opposite direction, from B to A.

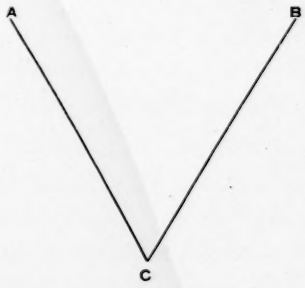
Suppose the straight line A B to represent a railroad.



Suppose the curved line A, C, B to represent a river running from A, down to B. The current and shoals in the river may be such that competing boats may be able to carry from A, down stream to B, a much greater tonnage than they can carry from B, up stream to A. Such boats could, and would, offer much lower rates, per ton, from A to B, than from B to A; and the railroad, in carrying from A to B, would be forced to meet the down-stream rates of the competing boats, or abandon to the boats, all of the traffic passing from A to B. In that event, the railroad would have no source of freight revenue, except the freight passing from B to A; and, assuming the volume of such freight to be equal in each direction, the railroad would be compelled to charge much higher rates from B to A, than it could have afforded to accept, if it had been allowed to compete with the boats, for the freights passing from A to B.

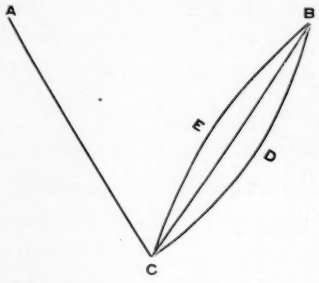
If the English "Equality Clause" had been applied to shipments in opposite directions over such a railroad, persons shipping from A to B, would have been deprived of their natural advantages, consisting of the fact that they had railroad transportation which was in competition with down-stream navigation; and persons shipping from B to A, would have been deprived of their natural advantages, consisting of the fact that they could have obtained very much lower railroad rates, if the railroad had been allowed to compete with the boats, and had not been forced to rely for its support, exclusively upon freight passing from B to A.

Suppose the line A C and the line B C to represent two lines of railroad, belonging to the same company:



Suppose said lines to be of equal length. Suppose a shipment of a certain class of freight to be made from A to C; and, at the same time, a shipment of the same class of freight to be made over the equal distance, from B to C; the English "Equality Clause" would *not* apply. The point of arrival would be the same; but the points of departure would be different, and the shipments would pass over different portions of the line. So, if a shipment of a certain class of freight be made from C to A, and, at the same time, a shipment of the same class of freight be made over the equal distance, from C to B, the English "Equality Clause" would *not* apply. The point of departure would be the same; but the points of arrival would be different, and the shipments would pass over different portions of the line. Certain competitive conditions might govern traffic passing between B and C, which would be substantially dissimilar from those governing traffic passing between A and C.

Suppose the line A C, and the line B C, to represent two lines of railroad belonging to the same company; and suppose said lines to be of equal length.



Suppose the curved lines C D B and C E B to represent railroads, or navigable rivers, which are in competition with the line B C. The rates offered by those competing lines must be met by the line B C, or it must abandon the business; and yet, if it meets the competitive rates, it must accept lower rates from B to C, than it accepts for the equal distance, from A to C; notwithstanding the rates from A to C may be reasonably low, in and of themselves. If the Company were compelled to retire from competition on the line B C, and abandon that traffic to the rival lines, the company would have no source of freight revenue, except the freight passing between A and C; and, assuming the volume of such freight to be equal to the volume of freight passing between B and C, the Company would be compelled to charge much higher rates between A and C, than it could have afforded to accept, if it had been allowed to compete for freight between B and C.

If the English "Equality Clause" had been applied to shipments from different points of departure, or to different points of arrival, persons shipping between B and C, would have been deprived of their natural advantages, consisting of the fact that they had two or more competing lines upon which to rely for the

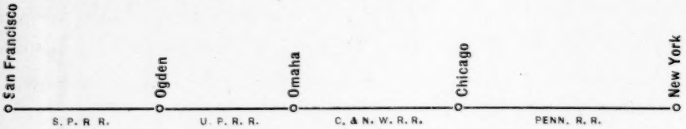
transportation of their traffic; and persons shipping between A and C, would have been deprived of their natural advantages, consisting of the fact that they could have obtained very much lower railroad rates, if the line B C had been allowed to compete with its rivals, and the company had not been forced to rely for its support, exclusively upon freight passing between A and C.

XXIII.

It appears from a statement made by Senator Sherman on the 14th of January, 1887, in the debate on the Act to regulate commerce, that the words, "and from the same original point of departure, or from the same point of arrival," were at one time contained in the bill then under discussion; and that those words were stricken out by the Conference Report.

While the English "Equality Clause" may be suited to the commerce of a small country like England, where the lines of railway are comparatively short, such a clause would be highly detrimental, in this country, where several lines of railroad engage in the transportation of traffic for very great distances, and frequently carry traffic entirely across the continent. Congress, therefore, acted wisely, in striking out the words referred to by Senator Sherman, and in adopting the words "under substantially similar circumstances and conditions," which import a very different meaning from the words "under the same circumstances," as found in the English "Equality Clause;" which was confined in its operation to shipments passing only over the same portion of the line, between the same points of departure, and the same points of arrival.

Suppose the following diagram to represent a joint through line from San Francisco to New York, composed of the separate lines of five different railroad companies:



Suppose two car loads of wheat to be shipped from San Francisco, on the same day, and in the same train; that one of said cars be destined to Ogden, where the wheat contained in it is to be ground into flour, and consumed. Suppose the other car load of wheat be destined to New York, whence it is to be exported to Liverpool, to be sold in competition with wheat grown in Russia, India, or Argentine. Now, if the English "Equality Clause" had been adopted by Congress literally, and with the construction which some of the English courts are said to have placed upon the words "under the same circumstances," as used in that clause, the Southern Pacific Railroad Company would have been compelled to charge precisely the same rate, per ton, per mile, upon the car load of wheat destined to New York, as it charged upon the car load destined to Ogden. The two shipments would have consisted of "goods of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the railway, under the same circumstances." All the "circumstances *of the carriage*," by the Southern Pacific Railroad Company, would have been exactly the same. "*The rate of speed, risk, and expense of carriage*," by that railroad, would have been exactly the same. Every circumstance and condition which could have had the slightest relation "*to the nature and character of the service rendered by the carrier*," or which could possibly have affected the "*cost of transportation*," was, so far as the Southern Pacific Railroad was concerned, exactly the same in the case of the car destined to New York, as

in the case of the car destined to Ogden. The points of arrival and departure, so far as the Southern Pacific Railroad was concerned, would have been exactly the same; and yet no one will pretend that the Southern Pacific Railroad Company would have been obliged to charge as much per ton, per mile, on the car destined to New York, as it charged upon the car destined to Ogden.

If the joint through rates, charged by a long through line of American railroads, were required to be equal to the sum of the separate through rates, of the different railroads forming the through line, it would be impossible to move a very large per cent. of the traffic of this country.

XXIV.

The English Cases Relied Upon by Counsel for the Commission.

The cases relied upon in the Court below were, *The Great Western Railway Co.* vs. *Sutton*, Law Rep. 4, H. L., p. 226; *L. & N. W. Ry. Co.* vs. *Evershed*, Law Rep. 3, App. Cas., p. 1029; *M. S. & L. Ry. Co.* vs. *Denaby Main Colliery Co.*, Law Rep. 11, App. Cas., p. 97, reported also in 6 Railway & Canal Traffic Cases, p. 133.

The Sutton case was this: Sutton was, what is known, in this country, as an express carrier, and was engaged in doing an express business over the line of the Railway Company. The Railway Company was also engaged in doing an express business, on its own account, over its own line; and the express goods carried by the Railway Company were of the same description, and were carried *only over the same portion of the line*, and under the same circumstances, as were the express goods which were carried for Sutton. *As the points of departure and*

arrival were the same, with reference to Sutton's goods, as they were with reference to the express goods carried by the Railway Company, on its own account, the discrimination was held to be a violation of the "Equality Clause."

Suppose the Southern Express Company was conducting an express business, over the line of the C., N. O. & T. P. Ry., between Cincinnati and Chattanooga, and that Railway Company was also engaged in conducting an express business on its own account, over its own line, between the same points. The Sutton case decides, that the C., N. O.& T. P. Ry. Co. could not charge the Southern Express Company higher rates than it charges for express matter, carried upon its own account, between the same points; but it does not decide that the C., N. O. & T. P. Ry. Co. could be compelled to accept from the Southern Express Company the same rate per ton, per mile, for transportation between Cincinnati and Chattanooga, as the proportion which that Railway Company may be accepting of through rates, for similar traffic, shipped from Cincinnati to New Orleans, or from Cincinnati to Augusta.

The Evershed case was this: The Midland Railway Company, and the London & Northwestern Railway Company were in active competition at Burton-upon-Trent.

Certain persons owned breweries at Burton-upon-Trent, adjacent to the main line of the Midland Railway, and had side tracks running from said main line into their breweries; so that their freights could be loaded and unloaded by their own servants, directly upon the cars of the Midland Railroad, without any expense for cartage, or other terminal charges. The plaintiffs also owned breweries at Burton-upon-Trent; but their breweries were not connected with the Midland Railway, by side track, or otherwise. The London & Northwestern Railway charged the plaintiffs, whose breweries were not connected with the Midland Railway, cartage for hauling the plaintiffs' goods from their breweries

to the depot of the L. & N. W. R'y; but, as to those persons whose breweries were connected with the Midiand Railway by side tracks, the L. & N. W. R'y Co. hauled their goods to and from its depot, free of charge. It resulted that two persons might ship by the L. & N. W. R'y Co. goods of the same description, from the same point of departure (i. e., Burton-upon-Trent), and to the same point of arrival, the goods passing only over the same portion of the line, and yet the rate charged by the L. & N. W. R'y Co. against one of them, would be greater (to the extent of the cartage charge), than the rate charged against the other.

If the appellant railroad companies in this case were to charge more to one shipper than another, where they both shipped the same description of goods from Cincinnati to Social Circle, the Evershed case would be an authority against the appellants; but there is nothing in the Evershed case, which intimates that upon a shipment from Cincinnati to Social Circle, the Georgia Railroad is bound to accept the same rate from Atlanta to Social Circle, as its proportion of the through rate from Atlanta to Augusta.

The Denaby Main Colliery Co. case was this: A railway company carried coal for different customers "only over the same portion" of it its line of railway; and it was held, that the fact that the coal carried for one customer was to be shipped to certain ports, in order to develop a new trade, or to open up new markets, and so to increase the tonnage carried, did not constitute such a difference in the "circumstances," as to justify an inequality of rates.

The House of Lords, in the Denaby Main Colliery Co. case, referring to Sutton's case, and Evershed's case, states, that the goods in those cases were carried only "over the same portion of the line."

See the Report of the Denaby Main Colliery Co. case, in 6 Railway and Canal Traffic Cases, pages 133, 141.

If two persons were to ship the same description of goods, by the line of the appellant railroad companies, from Cincinnati to Augusta, and the appellants should charge one of them a less rate than the other, merely because the goods of the former were intended for export, or for any other specific purpose, the Denaby Main Colliery Co. case would be an authority against the appellants; but there is nothing in that case to intimate that the appellants are bound to accept a combination rate from Cincinnati to Social Circle, not higher than their joint through rate from Atlanta to Augusta.

XXV.

Other English Cases Upon the "Equality Clause."

In the case of the *Attorney General* vs. *B. & D. J. R'y Co.*, 2 Eng. R'y and Canal Cases, page 124, it appeared that the Birmingham & Derby Junction R'y Act empowered that company to receive from passengers conveyed by the company's carriages, tolls, not exceeding a specified amount. By the 63d section of a subsequent Act, it was provided that the charges by the first Act, authorized to be made for the carriage of passengers, goods, etc., "shall be at all times charged equally, and after the same rate per ton, per mile, in respect of all passengers and goods of a like description, and conveyed or propelled by a like carriage or engine passing on the same portion of the line only, and under the same circumstances, etc." [P. (127).]

The B. & D. J. R'y, commencing at Derby, intersected the L. & B. R'y at Hampton-in-Arden. Afterward the Midland Counties R'y was built from Derby to an intersection with the L. & B. R'y at Rugby. There were then two competing routes from Derby to London; and the new route opened by the M. C. R'y was the shortest. In order to meet that competition, the B. & D.

J. R'y Co. charged through passengers who were traveling between the competitive points, Derby and London, at the rate of two shillings between Derby and Hampton-in-Arden, while they charged local passengers who were only traveling between the non-competitive points, Derby and Hampton-in-Arden, or points on the L. & B. R'y, short of London, at the rate of eight shillings between those points.

The Attorney General filed a bill against the B. & D. J. R'y Co., charging that said company had fixed the aforesaid unequal charges, since the opening of the M. C. R'y, "in order to induce passengers, goods, and merchandise to be conveyed to Derby by way of their railway; and for that purpose have made a reduction in the charge for conveyance by them, in favor of persons traveling upon the railway between Hampton-in-Arden and Derby, who are proceeding from or to London along the L. & B. R'y, and who would otherwise travel by the M. C. R'y, although such persons traveled upon and used the railway between Hampton-in-Arden and Derby *under the same circumstances* with persons in favor of whom no such deduction is made." [P. (129).]

The bill prayed [p. (130)] "that it may be declared that the charges made by the B. & D. J. R'y Co. for the carriage of passengers, goods, wares, and merchandise conveyed by the company, and *passing on the line of the railway for the whole distance between Hampton-in-Arden and Derby by the same or like trains, propelled by the same or like carriages*, ought to be charged equally and after the same rate, whether such passengers, goods, merchandise, etc , proceed on, or are conveyed along the L. & B. Railway for the whole distance from or to London or not, . . . and that the company be restrained from charging lower rates in respect of such passengers, goods, and merchandise as pass along the L. & B. R'y for the whole distance between London and Hampton-in-Arden, than the rates charged by said company in respect of such passengers, goods, and merchandise as do not

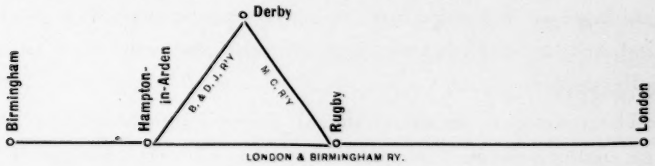
pass along the L. & B. R'y at all, or so pass for a distance short of the whole distance between London and Hampton-in-Arden."

The Lord Chancellor dismissed the motion with costs, saying: "It is not denied that they (the company) carry those who are going (from Derby to Hampton-in-Arden) at the charge which they are authorized to make, but persons traveling *under other circumstances*, not intending to stop there, but going on to London, are, according to the Attorney General's complaint, charged two shillings instead of eight shillings. Now, I do not know who will suffer by that arrangement, whatever may be the cause of it. . . . The Attorney General now asks me to interfere to prevent the company carrying passengers (between competitive points) at too low a rate. . . . It is not necessary to say anything about the jurisdiction of the Court, or how far I should interfere if I had the power, because I am quite clear that the 63d section has not the slightest reference to this case." [P. (132).]

The 63d section of the B. & D. J. Ry. Act was almost identical with the English "Equality Clause." All passengers who were carried by the B. & D. J. Ry. from Derby to Hampton-in Arden were carried *from the same point of departure to the same point of arrival*, and therefore they were carried *over "the same portion of the line" only*. They were *conveyed in the same cars, propelled by the same engines, and under the same circumstances*, so far as "*the rate of speed, risk, and expense of carriage*" by that railroad, were concerned. Every circumstance and condition which could have had the slightest relation "*to the nature and character of the service rendered by the carrier*," or which could possibly have affected *the "cost of transportation"* was, so far as the B. & D. J. Ry. Co. was concerned, exactly the same, in the case of one of those passengers, as it was in the case of the other. It follows, therefore, that the Chancellor, in holding that the "Equality Clause" did not apply, must have been of opinion that

passengers carried between competitive points (i. e., between Derby and London), are not carried under the same circumstances as local passengers carried between non-competitive points (i. e., between Derby and Hampton-in-Arden); notwithstanding both classes of passengers may have traveled over the same portion of the B. & D. J. Ry., in the same cars, propelled by the same engines.

The following diagram sufficiently illustrates the competitive situation which existed between the Birmingham & Derby Junction Ry. and the Midland Counties Ry., referred to in the case last cited:



XXVI.

Legislative History of the Second Section of the Act to Regulate Commerce.

On January 6, 1886, Hon. John H. Reagan introduced in the House of Representatives, H. R. 2412, known as the "Reagan Bill."

The first section declared it to be unlawful, "directly or indirectly to charge to, or receive from, any person, any greater or less rate or amount of freight, compensation, or reward than is charged to, or received from, any person, or persons, for *like and contemporaneous service* in the carrying, receiving, delivering, storing, or handling of the same," etc.

On January 18, 1886, Senator Cullom introduced in the Senate, S. 1093, known as the "Cullom Bill."

The second section declared it to be unlawful, directly or indirectly, to charge or receive from any person or persons, a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, than it charges, demands, collects or receives from any other person or persons for doing for him or them "*a like and contemporaneous service, in the transportation of a like kind of traffic, under substantially similar circumstances and conditions.*"

It will be noticed that the second section of the Cullom Bill adopts from the first section of the Reagan Bill, the phrase, "like and contemporaneous service;" but adds two very important qualifications to that phrase, viz., that the traffic shall be of like kind, and that the circumstances and conditions shall be substantially similar.

The prohibition against unequal charges in cases of "a like and contemporaneous *service*," as contained in the Reagan Bill, was sufficient to cover every circumstance and condition that could possibly affect the *cost to the carrier:* and if it had been intended that the *cost to the carrier* should be the sole, or controlling factor in fixing rates of transportation, the Reagan Bill needed no amendment whatever, on that point. For, if the *service* is "*like and contemporaneous*" in two cases, the *cost to the carrier* of performing the mere transportation service would be practically the same in each case. A car loaded with coal, and a car loaded with dry goods, if carried the same day, in the same train, propelled by the same engine, over the same road, would present a case of "like and contemporaneous service," under the Reagan Bill; and assuming the weights of the two car loads to be same, the *cost to the carrier* of the mere transportation service, would be no more in the case of the car load of dry goods, than it would be in the case of the car load of coal. Grave fears were expressed that the Reagan Bill, if passed, would compel a railroad, in the case last supposed, to charge as much for the car load

of coal as for the car load of dry goods; and, consequently, that the Reagan Bill would destroy the entire system of railroad freight classification. In order to remove all doubt upon that point the Cullom Bill provided that before equality of charge can be demanded, it must be shown not only that the *service was* "*like and contemporaneous*," but also that the service was rendered "in the transportation *of a like kind of traffic*." None of the low class freights could be moved at all, if forced to pay first class rates, or even the average of all the rates charged by railroads for transportation. The Cullom Bill, therefore, authorized the railroads, even where the *cost to the carrier* was the same, to so graduate their rates upon each "*kind of traffic*," as to enable all kinds to be moved without injustice to any; thus recognizing as sound the much-abused and misunderstood principle of charging no more than the particular "traffic can bear."

But the Cullom Bill went still further. It recognized the fact that there might be "a like and contemporaneous service;" and that such service might be rendered "in the transportation of a like kind of traffic;" and yet, that it might be ruinous to the best interests of the country to force an absolute, unconditional equality of charge in every case. It was known that the products of the West, and Northwest, could never reach the seacoast, if the joint through rates, charged by a long through line of railroads, were required to be equal to the sum of the separate through rates of the different railroads forming the through line.

It was known that the destruction of that traffic would destroy the competition which has existed between the various cities of the Northwest, for the control of that traffic; and that it would also destroy the competition which has existed between the different railroads of that section, for the carriage of that traffic. In order to protect those vast interests, the Cullom Bill provided, that before equality of charge can be demanded, three important facts must be shown:

First: That the *service* "is like and contemporaneous." This covers every element that can enter into the *cost to the carrier* of rendering the service.

Second: That the service shall be rendered in the transportation of "*a like kind of traffic.*" This preserves the system of railroad freight classification; and covers every element of cost that can arise from the various kinds or classes of freight.

Third: That the transportation service shall be rendered under "substantially similar circumstances and conditions." This general clause was intended to cover all such other circumstances and conditions as should properly influence the making of railroad rates; and among others the important conditions arising out of the competition of carrier with carrier, market with market, and product with product.

We submit with great confidence that the principal object of using the phrase, "under substantially similar circumstances and conditions," in the second section of the Cullom Bill, must have been to cover those circumstances and conditions which arise out of one or the other of the three kinds of competition just mentioned.

XXVII.

The Construction of the Second Section by This Court.

In the case of the *I. C. C.* vs. *B. & O. R. R.*, 145 *U. S.*, 281, known as the "party rate" case, Mr. Justice Brown said:

"In order to constitute an unjust discrimination under section 2, the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate or other device; but in either case it must be for a 'like and contemporaneous service in the transportation of a like kind of traffic, *under substantially similar circumstances and condtions.*' To bring the present case within the words of this section, we must

assume that the transportation of ten persons on a single ticket is substantially identical with the transportation of one, and, in view of the universally accepted fact that a man may buy, contract, or manufacture on a large scale cheaper proportionately than upon a small scale, this is impossible.

"In this connection we quote with approval, from the opinion of Judge Jackson in the Court below: 'To come within the inhibition of said section, the differences must be made under like *conditions;* that is, there must be contemporaneous service in the transportation of like kinds of traffic under substantially the same circumstances *and conditions.* In respect to passenger traffic, *the positions of the respective persons, or classes, between whom differences in charges are made, must be compared with each other*, and there must be found to exist *substantial identity of situation* AND *of service*, accompanied by irregularity and partiality, resulting in undue advantage to one, or undue disadvantage to the other, in order to constitute unjust discrimination.'" (P. 282.)

In order to contrast the views announced by this Court in that case, with the views announced by the Commission in this case, we print them in parallel columns:

By this Court:	By the Commission:
"The differences must be made under like *conditions*" . . . . "there must be found to exist substantial identity of SITUATION and of service." 145 U. S., 282. It was not designed "to prevent competition between different roads." Pages 276, 281.	The circumstances and conditions "must have relation to the nature and character of the SERVICE rendered by the carrier," etc. They must have relation "TO THE COST of transportation," etc. Transcript, pages 19, 18.

The Commission insists upon applying to the second Section of our Act certain language to be found in certain English cases, decided upon the English "Equality Clause," which was confined to shipments which moved from the same point of departure to the same point of arrival, and which passed only over the same portion of the line. The Commission insists upon its rule of construction, notwithstanding Congress purposely omitted all

reference to the English requirement in regard to the goods passing "only over the same portion of the line;" and deliberately struck out of the Act all reference to points of departure and arrival.

In all questions of discrimination under the second Section, the Commission insists upon restricting the comparison "to the nature and character of the SERVICE rendered by the carrier," and *refuses to consider the* "SITUATION," *and the* CONDITIONS under which the service may be performed; while this Court holds that the SITUATION, and CONDITIONS, under which the service may be performed, are to be considered, as well as the service itself.

This Court said that the Act was not intended "to prevent competition between different roads;" and, if that be so, the dissimilarity in the *competitive* "*conditions*," or in the *competitive* "SITUATION," may be legitimately considered, as well as the "service" rendered by the carrier.

The only object which the B. & O. R. R. had in selling "party rate" tickets, was to enable it to compete successfully with its rivals who had not seen proper to issue that kind of tickets.

The Commission not only restricts the comparison to the "service" performed by the carrier, but it insists that, in comparing the "service," only those elements shall be considered which have relation "to the *cost*," to the carrier, of rendering the service. This is the more remarkable, because the Commission admits the well known fact that it is "impossible to apportion, with accuracy, the *cost* of service among the items of traffic;" and, in consequence thereof, "the propositions which, from time to time, have been made in other countries to measure the charges of the carrier by the cost of the carriage, solely, have always been abandoned after investigation."

1. I. C. C. Rep. 63, 64. In re. L. & N. R. R. Co.

By restricting the comparison to those elements only which have relation "*to the cost*," to the carrier, of rendering the service, the Commission "ignores the element of *the value of the service* (*to*

the shipper) in fixing the reasonable compensation, and denies the shipper any remuneration for additional *risk*."

It was because the Commission had disregarded the element of *the value of the service*, and had denied the carrier any remuneration for additional *risk*, that Judge Wallace refused to enforce the order of the Commission in the case of

I. C. C. vs. *D., L. & W. R. R. Co.* Pamphlet Opinions, page 1.

The "*value of the service*" rendered by one carrier, cannot exceed the rate for which a competing carrier may offer to perform the same service.

Transcript, pages 85-89.

And, therefore, the consideration of "the *value* of service" *necessarily involves the competition which limits that value.*

XXVIII.

The Third Section of the Act to Regulate Commerce.

Section 2 of the English "Act for the better regulation of the traffic on Railways and Canals" (10th July, 1854); and the 11th Section of the English "Act to make better provision for carrying into effect the Railway and Canal Traffic Act, 1854, and for other purposes connected therewith" (21st July, 1873), contain certain provisions from which the third section of the Act to regulate commerce was modeled.

For the convenience of the Court, we print in parallel columns so much of said sections as are material for the present purpose:

UNDUE PREFERENCE CLAUSE.

English Act.

SEC. 2. Railway and canal traffic act, 1854.—1 *Nev. & Mac., p.* 2.

SEC. 11. Railway and canal traffic act, 1873.—1 *Nev. & Mac., p.* 11.

. . . And no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.—1 *Nev. & Mac., p.* 2-11.

UNDUE PREFERENCE CLAUSE.

American Act.

SEC. 3. Act to regulate commerce.

That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.—24 *U. S. Stat. at Large, p.* 380.

XXIX.

The History of the Second Section of the English Act of 1854.

The following history of the second section of the English Act of 1854 is taken from the opinion of the court in the case of *Lancashire & Yorkshire Railway Co.* vs. *Greenwood*, Law Rep. 21, Q. B. (1888), pages 217, 218, decided April 25, 1888:

"In the Railways Clauses Consolidation Act, 1845, (8 & 9 Vict. C. 20), Section 90, there was a provision requiring that the company should charge equal rates; but that had been construed by the courts to mean equal rates for the carriage of goods *over the same portions of the line*, so that, if there was a charge from A to B, which was equal to all persons sending goods from A to B, no objection could be raised to that under Section 90 of the Railways Clauses Consolidation Act; but if a particular person X was charged so much for the carriage of his goods from A to B, and another person Y was charged less, then there was inequality within the meaning of Section 90 of the Railways

Clauses Consolidation Act, which entitled the person aggrieved to maintain an action for the amount which had been overcharged to him."

"Where, however, the places over which the goods were carried were not the same, as for instance where there was a charge of so much from A to B, and of so much from B to C, then although the charges might be the same, while the distances were only half in the one case what they were in the other, yet that was not an inequality within Section 90 of the Railways Clauses Consolidation Act."

"In order to meet this grievance the Railway and Canal Traffic Act, 1854, was passed, and by Section 2 of that Act it is open to any person to complain that he is subjected to undue or unreasonable prejudice or disadvantage by reason of the charge for carriage from A to B being excessive as compared with what is charged for carriage from B to C. That complaint was one which before then he could not have made; but under the Railway and Canal Traffic Act, 1854 he is enabled to go before the Court to make that complaint."

"Obviously the considerations would be of a somewhat intricate nature. It would be necessary to inquire what were the reasons why more was charged for one distance than was charged for another distance, or why proportionately more was charged for one distance than was charged for another, and that would depend upon a great many considerations arising out of *the nature of the traffic*, the peculiar facilities, THE COMPETITION WHICH MIGHT BE DEVELOPED and a great many other matters which quite obviously were unfit to be tried by a jury, and therefore the Legislature thought fit when passing the Railway and Canal Traffic act of 1854 to add Section 6 which is in these terms: No proceeding shall be taken for any violation or contravention of the above enactment except in the manner herein provided:" etc. . . .

"The manner provided in the Railway and Canal Traffic Act was by application to the Court of Common Pleas by motion or summons and peculiar powers were given to the Court to enable them to deal with the complaint when it arose, and to arrive at a just estimate as to whether there was or was not any grievance

to which the complainant had been subjected. As I have said it was a matter which was necessarily complicated; and very unfit indeed to be tried by a common jury to whom the consideration that the charge from A to B was larger in proportion to the mileage than the charge from B to C *presented almost irresistible attractions.*"

The jurisdiction was afterward transferred from the Court of Common Pleas to the Railway Commissioners by the Regulation of Railways Act, 1873 (36 & 37 Vict. C., 48), Section 6; Law Rep. 21 Q. B. (1888), pp. 217, 218, and note on p. 218, *L. & Y. R'y Co.* vs. *Greenwood.* The italics in the above quotation are ours.

XXX.

English Cases Under the Railway and Canal Traffic Act, 1854.

The case of *Hozier* vs. *The Caledonian R'y Co.*, 1 Nev. & Mac., pp. 27–32, was decided in 1855.

Hozier filed a petition against the Caledonian R'y Co., alleging that he was aggrieved by being charged nine shillings six pence for traveling between Motherwell and Edinburgh, a distance of forty-three miles, while passengers traveling in the same train, and in the same class of carriage between Glasgow and Edinburgh, a distance of fifty-nine miles, were charged only two shillings; and that the through rates charged between Edinburgh and Glasgow amounted to an undue and unreasonable preference in favor of such through passengers over petitioner and others, traveling between Motherwell and Edinburgh, or Motherwell and Glasgow, and intermediate places.

1 Nev. & Mac., p. 28.

The petition was dismissed January 20, 1855.

Lord Curriehill said: "The only case stated in the petition,

is that passengers passing from Glasgow to Edinburgh, or from Edinburgh to Glasgow, are carried at a cheaper rate (*aggregate*) than passengers from Motherwell to either of these places. Now, that is an advantage, no doubt, to those passengers traveling between Edinburgh and Glasgow. But is it an *unfair* advantage over other passengers traveling between intermediate stations? The complainer must satisfy us that there in something *unfair* or *unreasonable* in what he complains of, in order to warrant any interference. Now, I have read the statements in the petition, and I have listened to the argument in support of it, to find what is *unreasonable* in giving that advantage to through passengers. What disadvantage do Motherwell passengers suffer by this? I think that no answer was given to this, except that there was none."

1 Nev. & Mac., pp. 31 and 32.

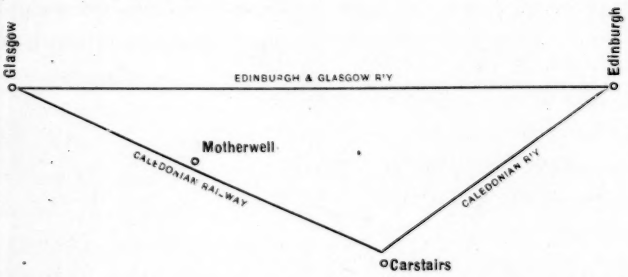
In the report of the case in the *Law Times*, Lord Curriehill is said to have added: "This petitioner's complaint may be likened to that of the laborer, who having worked all day, complained that others, who had worked much less, received a penny, like himself."

1 Nev. & Mac., p. 32, note 4.

That case was cited by this court, in the case of *Interstate Commerce Commission* vs. *B. & O. R. R. Co.*, as holding, in substance, "that the allowance of a reduced through rate worked no injustice to passengers living on the line of the road who were obliged to pay at a greater rate." (145 U. S., p. 283.)

The Hozier case certainly decides that to charge local passengers a greater compensation, *in the aggregate*, for a shorter distance, than is charged through passengers, for a longer distance, between competitive points, does not subject the local passengers "to any *undue* or *unreasonable* prejudice or disadvantage in any respect whatever," notwithstanding the passengers, through as well as local, may travel over the same line, in the same direction, in the same trains, and in the same class of carriages.

The following diagram sufficiently illustrates the competitive situation which existed between the Caledonian Railway and the Endinburgh & Glasgow Railway :



In the Hozier case, the Lord President based his judgment upon the fact that the petitioner had not shown any title or interest to maintain the proceeding; his opinion being that, before a case of undue preference can be made out, under the Act of 1854, the parties must stand "*pari passu* in the matter," *and must be brought* "*into competition*, in order to give them an interest to complain." See 1 Nev. & Mac., p. 30

145 U. S., pp. 282, 283.

According to the opinion of the Lord President, it would be necessary, in this case, to show that the town of Social Circle stands in *pari passu* with the city of Augusta, *and that those two places are in competition with each other.* There is, however, no evidence that any competition whatever exists between the town of Social Circle, and the city of Augusta.

Lord Curriehill declined to found his opinion on the want of title or interest in the petitioner to maintain the proceeding, and based his judgment upon the merits, viz.: That while the carriage of passengers between the competitive points (Glasgow and Edinburgh) at a cheaper rate than passengers to or from non-competitive points, was an advantage or preference to those passengers traveling between the competitive points (Glasgow and Edinburgh), it was not an *unfair* advantage, nor an *undue*

preference of those passengers over passengers traveling to and from non-competitive points.

It is immaterial, therefore, whether the decision in the case be based upon the opinion of the Lord President, or upon the opinion of Lord Curriehill; for, in either event, it is equally valuable as an authority in our favor.

The case of *Jones* vs. *E. C. R'y Co.*, 1 Nev. & Mac., pp. 45–47, was decided in 1858.

It appeared in that case, that the Eastern Counties Ry. Co. managed and controlled a railway running from London via Colchester, and Manningtree, to Harwick. It was about 50 miles from London to Colchester; and about 70 miles from London to Harwick. Passengers traveling from London to Harwick, or the reverse, *passed through Colchester.* The railway company charged for season tickets from Colchester to London (say 50 miles) £45 per year; while it charged from Harwick, *through Colchester*, to London (say 70 miles), £20 per annum.

The Court (on January 27, 1858), refused a rule for an injunction. Williams, Judge, said: "For anything that appears, *there may be very good reasons for making such difference in price.* . . . At this moment *there is active competition at Reading between the Great Western and Southwestern Railways;* the consequence is, *that considerably less is charged for tickets from that place to London, and vice versa, than for intermediate stations.*" (Pp. 46, 47.)

Wills, Judge, said: "To bring the case within the Act (of 1854) you must show, as we held the other day in the case of Harris and the Cockermouth & Workington Railway Company, *that the journeys are substantially the same.*"

While it did not appear of record in the case that there was any competition between Harwich and London, and while there *was*, in fact, no *rail* competition, yet as Harwich was on the North Sea, and London was on the Thames River, the Court doubtless took judicial knowledge of the fact that there was at least *water* competition between Harwich and London.

That case decides that the fact that local passengers to, or from,

non-competitive points, are charged a greater compensation *in the aggregate* for a shorter distance than is charged through passengers for a longer distance between competitive points, does not determine that the local passengers are subjected "to any *undue or unreasonable* prejudice in any respect whatever;" notwithstanding the passengers, through as well as local, may travel over the same line, in the same trains, and in the same direction.

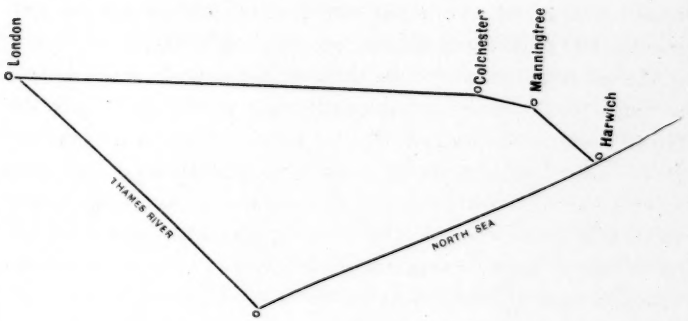
. . . It decides that a journey between competitive points (London and Harwick) *is not substantially the same* as a journey between non-competitive points (i. e., London to Colchester). It recognizes that the fact that active competition exists at points between which the through passengers are carried, affords "*a very good reason for making a difference*" between the rates charged such through passengers, and the rates charged local passengers at points where no competition exists.

1 Nev. & Mac., page 46.

And we submit that if competition affords *a good reason* for making a difference between competitive and non-competitive rates, it cannot be maintained that the transportation of local passengers, to or from non-competitive points, is done "under substantially similar circumstances and conditions" with the transportation of through passengers between competitive points, when competition forces the company to make the lower rate.

That case was cited by this Court in the case of the *Interstate Commerce Commission* vs. *B. & O. R. R. Co.*, 145 U. S., page 283.

The following diagram sufficiently illustrates the competitive situation which existed between the Eastern Counties R'y. and the water routes:



The case of *Foreman, et al.*, vs. *Great Eastern Ry. Co.*, 2 Nev. and Mac. 202, was decided by the English Railway Commissioners in 1875.

It appeared that the complainants imported coal, in their own ships, from points in the North of England, to Great Yarmouth, and forwarded the coal to various stations on the defendant's railway, between Great Yarmouth, and Petersborourgh.

The complainant stated that the defendant's rates for carrying coal from Yarmouth, to stations in the interior, at which complainants dealt, were unreasonably greater than the rates charged, in the opposite direction, from Petersborough to such stations; and that such difference in rates was made by the defendants for the purpose of favoring the carriage of coal from the interior, as against coal brought to Yarmouth by sea, and carried thence into the interior over the defendant's railway.

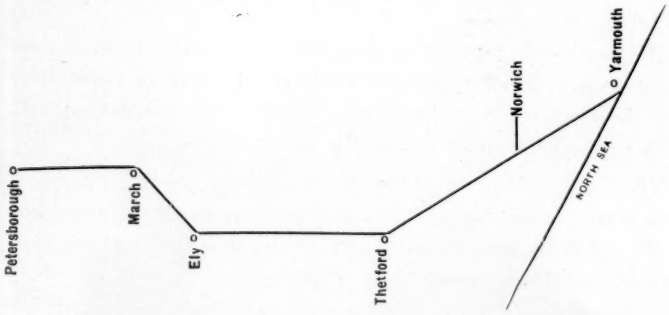
In brief, the complaint was that the defendants gave an undue preference to coal shipped from mines, on their line, in the interior, to the sea coast, over coal shipped from the sea coast into the interior. The commission found that it was true that the defendants did carry coal from the interior to London, Yarmouth, and other seaports on their line, at exceptionally low rates; but that it was done for the purpose of meeting the competition existing at those places.

It appeared that the rate from Petersborough to Thetford, (51 miles) was 4s. 4d., while the rate from Petersborough to Yarmouth (100 miles), was only 3s. 5d. (Pp. 205, 206.)

The commission said: "As, however, the complainants do not, as far as their trade in Yarmouth itself is concerned, use the Great Eastern Railway at all, the company cannot be said to prefer other traffic to theirs; NOR DOES THE TRAFFIC ACT PREVENT A RAILWAY COMPANY FROM HAVING SPECIAL RATES OF CHARGE TO A TERMINUS TO WHICH TRAFFIC CAN BE CARRIED BY OTHER ROUTES OR OTHER MODES OF CARRIAGE WITH WHICH THEIRS IS IN COMPETITION."

(2 Nev. & Mac., 205, 206.)

The following diagram sufficiently illustrates the competitive situation at Yarmouth, on the North Sea:



In that case, the rate from Petersborough to Thetford (the shorter distance point), was greater, *in the aggregate*, than the rate from Petersborough to Yarmouth (the longer distance point); and the only circumstance or condition to justify the perference shown to Yarmouth, was the sea competition which existed there, but which did not exist at Thetford.

In *Harris* vs. *Cockermouth, Etc., Ry.*, 1 Nev. and Mac., pages 97-108, decided in 1858, the Court held it to be an undue preference for a Railway Company to concede to the owner of a colliery a lower rate than to the owners of other collieries *from the same point of departure, to the same point of arrival*, merely because the

person favored had *threatened* to build a railway for his coal, and to divert his traffic from the Railway.

We have heretofore said in Sections XXII., XXIII. and XXIV. *that where the points of departure and arrival are the same*, whatever rates are conceded to one person, must be conceded to all persons shipping the same description of goods between those points; because, in such a case, it is impossible for there to be any difference in the circumstances or conditions of the different shipments as affected by competition. But, where either the points of departure, or the points of arrival, are different, there may be a substantial dissimilarity in the circumstances and conditions, as affected by competition.

The distinction for which we contend is clearly recognized in the case last cited.

Cockburn, C. J., said:

"I quite agree that this Court has intimated, if not absolutely decided, that a company is entitled to take into consideration ANY circumstances, either of a general or of a local character, in considering the rate of charge which they will impose upon any particular traffic." . . . . "As, for instance, in respect of *terminal* traffic, *there might be competition with another railway;* and in respect to terminal traffic as distinguished from intermediate traffic, it might well be that they could afford to carry goods over the whole line cheaper, or proportionally so, than they could over an intermediate part of the line." 1 Nev. & Mac., pages 102, 103.

And Crowder, J., said: "So also, as my Lord has put it, *there are many cases* in which a company may be justified *in making a difference between the rate charged for the conveyance of goods taken from one end of the line to the other*, and the rate charged for the conveyance of goods taken to an intermediate point between the termini."

1 Nev. & Mac., page 107.

So, in the *case of Ransome* vs. *E. C. Ry Co.*, 1 Nev. & Mac., page 120, decided in 1858, Crowder, Judge, said: "There are MANY circumstances which may induce a railway company to charge, on

parts of their line, rates which leave little or no remuneration, *as the proximity of rivers, or canals, or other lines of railway, which may enter into competition with them and materially affect their interests.*"

The case of *Budd* vs. *L. & N. W. R. R.*, was decided June 18, 1877. (4 Eng. Ry. and Canal Traffic Cases, 393, Brown & Macnamara.)

It is relied upon by counsel for the Commission, as an authority directly in point.

The plaintiff's company were the proprietors of iron and tinplate works, situate near defendant's railway, and about twelve miles from Swansea. The defendant charged plaintiff's company higher rates on plaintiff's traffic to Liverpool, than were charged by defendant upon similar traffic to other manufacturers whose works were situated *within a radius of six miles of Swansea.*

There was communication by sea between Swansea and Liverpool; and defendant's rate (from Swansea) was fixed to enable defendant to compete with the sea carriage. [Pp. (394) and (395).]

Chief Baron Kelly was of opinion that the defendant's conduct amounted to an undue preference and advantage to the manufacturers *within the six miles radius* of Swansea. He said that he thought the Budd case was "identical in principle with *Evershed* vs. *London and Northwestern Railway Company.*"

Barons Cleasby and Huddleston also rested their decisions entirely upon the Evershed case, pages 396 and 397.

We have heretofore shown in Section XXIV that in the Evershed case, the Railway Company discriminated between persons *shipping from the same point of departure*, (Burton-upon-Trent), *to the same points of arrival.*

The Budd case could not be "identical in principle" with the Evershed case, unless the plaintiff's works, in the Budd case, were, in the opinion of the Court, entitled to be considered *as within the Swansea District*, notwithstanding they were twelve miles distant from the town of Swansea.

The defendant railway company seems to have arbitrarily created "a District" or "Group" at Swansea, with a radius of six

miles; and no reason was shown why the radius was not made twelve miles instead of six. If the radius had been twelve miles the plaintiff's works would have been included within the Swansea "District" or "Group," and would have been entitled to the same rates as similar works situated within that District.

If plaintiff's works had been included within the Swansea "District" or "Group," the Budd case would have been "identical in principle" with the Evershed case; because the shipments would have all been made *from the same point of departure* (i. e., the Swansea District or Group) *to the same point of arrival* (i. e., Liverpool); and therefore all of the shipments from that District or Group would have been entitled to the same rates.

There is reason to believe that the Court, in Budd's case, was of opinion that the plaintiffs' works were entitled to be considered as within the Swansea District or Group; for Kelly, C. B., remarked that "a manufacturer who happened to behalf a mile within the (six miles) radius, would be preferred to one immediately without it." P. 396.

In the case of the *Liverpool Corn Traders' Association* vs. *L. & N. W. Ry. Co.*, 7 Ry. & Canal Traffic cases, on p. 135, it was said that the Budd case is in conflict with the subsequent Scotch case of *Murray* vs. *G. & S. W. Ry. Co.*, and with the case of the *Denaby Main Colliery Co.* vs. *M. S. & L. Ry. Co.*, on the point that an action will not lie to recover overcharges made in violation of the Act of 1854, against undue preference; and on page 142 this language was used: "Budd's case was cited with the view *that a desire to compete would not justify a preference;* but the doubts to which that case is subject, make it *very inconclusive as authority.*"

The Court of Appeals, in 1892, stated that it was unable to agree with the Budd case, if it involves the proposition that competition cannot be taken into account at all.

Law Rep. 1892; 2 Q. B., 248; *Phipps* vs. *L. & N. W. Ry. Co.*

In March, 1892, the English Court of Appeal decided the case of the *Executors, etc., of Pickering Phipps* vs. *L. & N. W. R'y.* (Law Rep. (1892), 2 Q. B., page 229.)

The late Pickering Phipps was the owner of iron furnaces, which were situated at Duston, on the line of the London & North-western R'y, at a distance of about sixty miles east from Great Bridge, one of the pig-iron markets.

There were iron furnaces (not owned by Phipps) situated at Butlins, and at Islip, which were also on the L. & N. W. R'y. They were east of Duston, and therefore more distant than Duston, from Great Bridge. Butlins was seventy-one miles, and Islip eighty-two miles, east of Great Bridge.

Duston was dependent for its railway carriage on the L. & N. W. R'y alone; but Butlins and Islip had both of them access, not only to the L. & N. W. R'y, but also to the Midland R'y.

The L. & N. W. R'y had, for charging purposes, grouped Butlins and Islip together; and, although it carried the Islip pig iron eleven miles further than the Butlins pig iron, it made the same charge from both places. The Midland R'y also charged the same rate, and the same total charge per ton, for the carriage from Butlins and Islip.

The L. & N. W. R'y, which carried the Butlins pig iron eleven miles further, and the Islip pig iron twenty-two miles further than the Duston pig iron, charged Butlins 95-100 of a penny per ton, per mile, and Islip 84-100 of a penny per ton, per mile, while it charged Duston 1.5-100 of a penny per ton per mile; so that the total charge per ton of pig iron from Duston to the western market was 5*s* 2*d*, while the total charge per ton from either Butlins or Islip was 5*s* 8*d* for the same class of merchandise. The executors of Phipps complained to the English Railway Commissioners that to charge for the carriage of pig iron from Butlins and Islip to the market, only 6*d* more than for the carriage from Duston, was, having regard to the difference of distance, an undue preference by the L. & N. W. R'y as compared with Duston; and the complaint was based on the second section of the Railway and Canal Traffic Act of 1854, which prohibits "any undue or

unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic." [Pp. (229), (230), (231).]

The L. & N. W. R'y claimed that the comparatively lower rates charged to Butlins, and Islip, were forced upon it by the competition of the Midland Railway. [P. (231).]

The English Railway Commissioners held that the L. & N. W. R'y, in fixing the rates in question, *were entitled to take into account the circumstances that Butlin and Islip had access to another line of railway which was in competition with its own*, and that no sufficient case of undue preference had been made out against it. [P. (231), (232).]

The executors of Phipps appealed, and the decision of the Commissioners was affirmed.

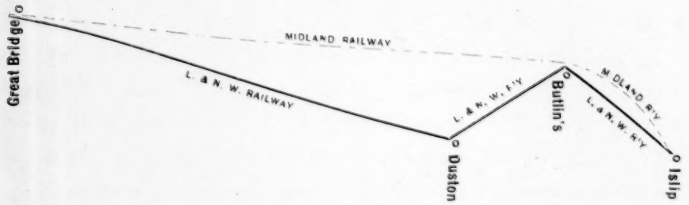
Lord Herschell, in the course of his opinion, used this language:

"I cannot but think that *a lower rate which is charged from a more distant point by reason of a competitive route which exists thence, is one of the circumstances which may be taken into account* under those provisions, and which would fall within the terms of this enactment (Act of 1888, Section 2, Sub-section 27), quite as much as the case to which I have called attention." Suppose that to insist on absolutely equal rates would practically exclude one of the two railways from the traffic, *it is obvious that those members of the public who are in the neighborhood where they can have the benefit of this competition, would be prejudiced by any such proceedings.* And further, inasmuch as competition undoubtedly tends to diminution of charge, and the charge of carriage is one which ultimately falls upon the consumer, it is obvious that the public have an interest in the proceedings under this Act of Parliament not being so used as to destroy a traffic which can never be secured but by some such reduction of charge, and the destruction of which would be prejudicial to the public by tending to increase prices. Therefore it seems to me that, *whether you look at the Act of* 1854 *by itself*, or

whether you look at it in connection with the provisions of Sub-Section 2 of Section 27 of the Act of 1888, to which I have been referring, it is impossible to say that there is anything in point of law which compels the tribunal to exclude from consideration this question of *competing routes*." [P. 245.]

The case of *Phipps' Executors* vs. *L. & N. W. R'y Co.* is the latest English case which we have been able to find upon the subject of undue preference.

The following diagram sufficiently illustrates the competitive situation in that case:



XXXI.

American Cases on Undue Preference.

The Constitution of Colorado provides that "all individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this State, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the State, and no railroad company, nor any lessee, manager, or employe thereof, shall give any preference to individuals, associations, or corporations in furnishing cars or motive power."

The Atchison, Topeka & Santa Fe R. R. Co. (hereinafter called the "Atchison" R. R. Co.) operated a railroad from Kansas City to Pueblo, about 634 miles. When its line first reached Pueblo

it had no connection of its own with Denver. The Denver & Rio Grande R. R. (hereinafter called the "Rio Grande" R. R.) was built and runn'ng between Denver and Pueblo, but the gauge of its track was different from that of the "Atchison" R. R. Other companies, occupying different routes, had, at the time, substanstantially the control of the transportation of passengers and freight between the Missouri River and Denver. The "Atchison" R. R. Co., being desirous of competing for this business, entered into an arrangement, as early as 1879, with the "Rio Grande" R. R. Co. for the formation of a through line of transportation for that purpose.

By this arrangement, a third rail was to be put down on the track of the "Rio Grande" road, so as to admit of the passage of cars continuously over both roads, and terms were agreed upon for doing business, and for the division of rates. The object of the parties was to establish a new line, which could be worked with rapidity and economy, in competition with the old ones. In the division of rates, the "Rio Grande" Company was allowed compensation at the rate of a mile and a half, for every mile of actual haul.

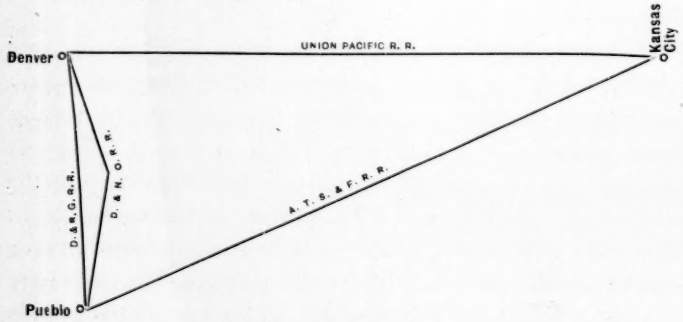
As the distance from the Missouri River to Pueblo by this route was about the same as to Denver by the competing routes, the through rates over this line to and from Denver, were usually made about the same as rates to and from Pueblo. This was necessary to compete with other lines for Denver business. Afterwards, an agreement was made between the "Atchison" R. R. Co. and its competitors, by which rates were established between Denver and the Missouri River, and arrangements made for a division of business among those companies, and for the regulation of their conduct towards each other, with a view to avoiding competition between themselves or from others.

In 1882 the Denver & New Orleans R. R. Co. (hereinafter called the "New Orleans" R. R. Co.) completed its road between

Denver and Pueblo, and requested of the "Atchison" R. R. Co. that it be placed upon an equal footing with the "Rio Grande" R. R. Co. in all traffic over the "Atchison" R. R., for which the "New Orleans" R. R. Co. and the "Rio Grande" R. R. Co. were competitors.

This request was refused, and the "Atchison" R. R. Co. continued its through business with the "Rio Grande" R. R. Co. as before, and declined to deliver freight or passengers at the junction of the "New Orleans" R. R., or to give or take through bills of lading, or to sell or receive through tickets, or to check baggage over that line. All passengers or freight coming from, or destined for that line, were taken or delivered at the regular depot of the "Atchison" Company in Pueblo, *and the prices charged were according to the regular rates to and from that point, which were more than the "Atchison" Company received on a division of through rates to and from Denver under its arrangements with the "Rio Grande" Company.*

The competitive situation at Denver, and Pueblo, is sufficiently shown by the following diagram:



The "New Orleans" Company filed a bill against the "Atchison" Company, the general purpose of which was to compel the "Atchison" Company to unite with the "New Orleans" Company, in forming a through line of railroad transportation to and

from Denver over the "New Orleans" road, with all the privileges as to exchange of business, *division of rates*, sale of tickets, issue of bills of lading, checking of baggage, etc., that were, or might be granted to the "Rio Grande" R. R. Co., or to any other railroad company competing with the "New Orleans" Company for Denver business. (110 U. S., 668, 669, 670, 671, *A. T. & S. F. Ry.* vs. *D. & N. O. Ry.*)

This Court, while holding that "both by the common law, and by the Constitution of Colorado, a railroad company is prohibited from discriminating unreasonably in favor of, or against, another company seeking to do business on its road" (p. 682), said that it did not follow that a company "must under all circumstances give one connecting road the same facilities, and the *same rates* that it does to another, with which it has entered into contract relations for a continuous through line, and arranged facilities accordingly." (P. 685.) And as to the rates insisted upon by the "New Orleans" Company, the Court used this language (pp. 683 and 684): "That the price must be reasonable is conceded, and it is no doubt true that in determining what is reasonable, the prices charged for business coming from, or going to other roads connecting at Pueblo, may be taken into consideration. But the relation of the 'New Orleans' Company to the 'Atchison' Company *is that of a Pueblo customer*, and it does not necessarily follow that the price which the 'Atchison' Company gets for transporting to and from Pueblo, on a division of through rates among the component companies of a through line to Denver, must settle the Pueblo local rates. It may be that the local rates to and from Pueblo are too high, and that they ought to be reduced, but that is an entirely different question from a division of through rates. There is no complaint of discrimination against the 'New Orleans' Company in respect to the regular Pueblo rates, *neither is there anything, except the through rates, to show that the local rates are too high.*

"The bill does not seek to reduce the local rates, but only to get their company put into the same position as the 'Rio Grande'

Company on a division of through rates. This can not be done until it is shown that the relative situation of the two companies with the 'Atchison' Company, both as to the kind of service, *and as to the conditions under which it is to be performed, are substantially the same*, so that what is reasonable for one must necessarily be reasonable for the other.

"When a business connection shall be established between the 'New Orleans' Company and the 'Atchison' Company at their junction, and a continuous line formed, different questions may arise; but so long as it is now, we can not say that, as a matter of law, the prices charged by the 'Atchison' Company for the transportation of persons and property coming from or going to the 'New Orleans' road, must necessarily be the same as are fixed for the continuous line over the 'Rio Grande' Railroad."

We submit that the opinion of the Court, in effect, establishes the following propositions:

First: That in order to meet competition, two or more railroad companies may by voluntary agreement form a joint through line, and that the joint through rate charged over such line may be less than the sum of the locals, or of the separate through rates of the roads forming the line.

Second: That the proportion of the joint through rate which each of the companies receives, may lawfully be less than the local rates, or less than the separate through rates charged by such company at the time, for transportation over the entire length of its own road; and,

Third: That freight tendered to one of the companies at an intermediate point on the joint through line, though such point may be one of the termini of the road of such company, and though such freight may be transported by said company over its entire line, is not transported by it *under substantially the same circumstances and conditions* as other freight transported by it passing between competitive points, notwithstanding the freight in both cases may be carried over the entire length of such company's road, in the same cars, and in the same trains.

In other words, notwithstanding the *service rendered by the company* may be the same in both cases, *so far as cost of transportation is concerned*, the fact of competition in the one case, and not in the other, creates *a substantial dissimilarity in the circumstances and conditions of the transportation.* And that is precisely the point for which the appellants in this case are now contending.

We submit that the case, in effect, establishes—

First: That in order to meet competition at Augusta, the C., N. O. & T. P. Ry., the W. & A. R. R., and the Georgia R. R. have the right to form a joint through line from Cincinnati to Augusta; and that the joint through rate from Cincinnati to Augusta may lawfully, be less than the sum of the locals, or of the separate through rates of those three roads.

Second: That the proportion of the joint through rate, from Cincinnati to Augusta, which is received by the Georgia R. R., may lawfully be less than the separate through rate charged by said road for transportation from Atlanta to Augusta, or less than the local rate charged by said road from Atlanta to Social Circle.

Third: *That freight transported between the competitive points, Cincinnati and Augusta, is not transported under substantially similar circumstances and conditions as freight transported from Cincinnati to Atlanta by the C., N. O. & T. P. Ry. and the W. & A. R. R., and thence transported by the Georgia R. R. to Social Circle,* a non-competitive local station on that road; and the fact that both shipments may be transported from Atlanta to Social Circle, in the same cars, and trains, is a matter of no consequence.

The sixth section of the Act of Congress, passed July 1, 1862, relative to the Union Pacific R. R. Co., provides that the Government shall at all times have the preference in the use of the railroad "at fair and reasonable rates of compensation, not to exceed the amount paid by private parties *for the same kind of service.*"

104 U. S., 663, *U. P. R. R.* vs. *U. S.*

In a case between the same parties, reported in 117 U. S., 362, it appeared that the company's uniform rate for the transporta-

tion of passengers between Council Bluffs and Ogden, when passengers purchased tickets at either of those places, was $78.50 each; but, by contracts with connecting railroad companies who sold joint through tickets at reduced rates from New York, San Francisco, and other places over their own, and the Union Pacific R. R., the latter company received, as its proportion of the joint through tickets, only $54 for each joint through passenger, carried between Council Bluffs and Ogden. Of course, the reduced rates, at which the joint through tickets were sold, were the result of competition by other lines, at the points between which the joint through tickets were sold.

The contention on the part of the United States (page 363) was, that passengers carried on its account between Council Bluffs and Ogden, should be carried, at the same rates as were charged for joint through passengers passing between those points as part of a journey over the entire joint through line; and the question of law involved in that contention, as stated by this Court, was, "whether the service rendered in transporting a local passenger between the two points is, in law, identical with that rendered in transporting a through passenger between the same points as part of the transit over the distance of the whole line;" and the Court held that the service in the two cases was not identical.

It does not appear in the report, but it was doubtless the fact, that the local passengers were carried by the Union Pacific R. R. in the same trains, and in the same class of cars, as the joint through passengers. Or, in other words, that the service rendered by the company was precisely the same, *so far as cost, risk, etc., were concerned*, in the case of a joint through passenger, as in the case of a local passenger; and the only reason why the transportation of the joint through passenger was not done *under substantially similar circumstances and conditions*, as the transportation of the local passenger was, *that in the former case competition controlled the rate for transportation, while in the latter it did not.*

In the case of *Ragan & Buffet* vs. *Aiken*, 9th Lea (Tenn.), 619,

it appeared that the defendant was the owner of a railroad about fifteen miles long, running from Rogersville to a junction with the E. T., V. & G. R. R. The complainants were merchants at Rogersville, and they alleged that they had been required by the defendant to pay freight at a rate of from twenty to twenty-five cents per hundred pounds; the gross amount of their payments aggregating about four thousand dollars; that the defendant, as an inducement to other merchants in Lee County, Va., and Hancock County, Tenn., to have their goods shipped to Rogersville, over defendant's railroad, instead of by other routes, had entered into contracts not to charge them exceeding fifteen cents per hundred pounds on similar freights; and complainants insisted that such discrimination was illegal. The Supreme Court of Tennessee (p. 622) said: "That in determining whether a company has given an *undue preference* to a particular person, the Court may look to the interests of the company." The Court further said that: "If the charge on the goods of the party complaining is reasonable, and such as the company would be required to adhere to *as to all persons in like condition*, it may nevertheless lower the charge of another person, *if it be to the advantage of the company, not inconsistent with the public interest, and based on a sufficient reason.* It is obvious that the intention of the defendant, in this instance, was not to discriminate against the complainants in favor of any person of the same place, and *in the same condition.* His object was to get business for his road from persons at a distance from its terminus, *which otherwise would reach its destination by a different route.* Under these circumstances we cannot see that the contracts complained of are against public policy, or that complainants have been damaged, if the charges on their goods were reasonable."

It is submitted that the case last cited is a direct authority for the position, that competitive traffic is not "in the same condition" as traffic which is not competitive, and that the fact that a carrier is forced to accept less rates between competitive points, than it can afford to accept between non-competitive

points, does not constitute an undue preference of the competitive points.

In the case of the *Interstate Commerce Commission* vs. *B. & O. R. R. Co.*, 43 Fed. Rep., 50, 51, Judge Jackson said: "Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage, or subject to undue prejudice or disadvantage, persons or traffic similarly circumstanced, the Act to regulate commerce leaves common carriers as they were at common law, free to make special contracts *looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce*, and generally to manage their important interests upon the same principles which are recognized as sound, and adopted in other trades and pursuits. Conceding the same terms of contract to all persons equally, may not the carrier adopt both wholesale and retail rates for its transportation services?" (See pp. 50, 51.)

Again, as regards the "undue preference" branch of the English Acts, Judge Jackson quotes from the Report of the English Amalgamation Committee of 1872, p. 13, as follows: "The effect of the (English) decisions seems to be that a company is bound to give the same treatment to all persons equally under the same circumstances; but that there is nothing to prevent a company, if acting with a view to its own profit, *from imposing such conditions as may incidentally have the effect of favoring one class of traders, or one town, or one portion of their traffic*, provided the conditions are the same to all persons, and are such as to lead to the conclusion that they are really imposed for the benefit of the railway company." (See p. 53.)

Again: Judge Jackson said, that the English cases "establish the rule that in passing upon the question of undue or unreasonable preference or disadvantage, it is not only legitimate, but proper, to take into consideration, besides the mere differences in charges, various elements, such as the *convenience of the public*, the fair interests of the carrier, the relative quantities or volume

of the traffic involved, the relative cost of the services and profit to the company, *and the situation and circumstances of the respective customers with reference to each other as* COMPETITIVE *or otherwise.*" (*See* pp. 53 and 54.)

The decision of Judge Jackson in the case of the *Interstate Commerce Commission* vs. *B. & O. R. R. Co.* (43 Fed. Rep., 49), was affirmed by this Court. (145 U. S., 263.)

Mr. Justice Brown, speaking for this Court, said:

"It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust and unreasonable. (P. 276.) . . . Indeed, the possibility of just discriminations and reasonable preferences is recognized by these sections, in declaring what shall be deemed unjust." (P. 277.)

Again: Speaking of the sale of a ticket for a number of passengers at a less rate than for a single psssenger, he said: "it does operate to the prejudice of the single passenger, *who cannot be said to be injured by the fact that another is able in a particular instance to travel at a less rate than he.* If it operates injuriously to any one it is the rival road, which has not adopted corresponding rates; but, as before observed, *it was not the design of the Act to stifle competition, nor is there any legal injustice in one person procuring a particular service cheaper than another.* (P. 281.) . . . . . If these tickets were withdrawn, *the defendant road would lose a large amount of travel, and the single-trip passenger would gain absolutely nothing.* (P. 281.)

XXXII.

Such Advantages as Augusta May Enjoy Over Social Circle Result From Causes Over Which the Appellant Railroad Companies Have no Control.

The Act to regulate commerce declares it to be unlawful *for any common carrier* subject to the the Act, "to make or give any undue or unreasonable preference or advantage to any particular . . . . locality or any particular description of traffic," etc.

The Act does not hold a common carrier responsible for any preference or advantage however great it may be, unless it be occasioned *by some wrongful act of the carrier.*

As between Augusta and Social Circle, it must be remembered that Augusta possessed great natural advantages over Social Circle, before any of the railroads involved in this controversy were dreamed of.

Augusta was laid out as a town, upon the Savannah River, in 1735, under a royal charter.

Several warehouses were built, and stocked with goods suitable for the Indian trade. Boats were used for transportation; and they made four or five voyages annually to Charleston.

Augusta soon became a great mart for trade; superior to any in South Carolina or Georgia. The annual fair of the Indian traders was held there; and it was attended by many of the Indian tribes. It was computed that over two thousand pack horses, and six hundred men annually visited the place.

White's Statistics of Georgia, page 513; Jones' History of Georgia, Vol. I., page 217.

Before the Georgia R. R. was built, freight from Cincinnati was carried down the Ohio and Mississippi Rivers to New Orleans, and thence by ocean to Savannah, and thence by river to Augusta. From Augusta it was hauled in wagons to Social Circle, 119 miles, at a wagon rate that amounted to about $1.20 per 100 pounds for that distance.

We see that in those early days the "preference or advantage" in favor of Augusta, or the "discrimination" against Social Circle, was four times as great as it is now; the present difference in rates being only 30 cents per 100 pounds. But as the "preference or advantage" in favor of Augusta, or the "discrimination" against Social Circle, in those days, was manifestly, the act of God; no one was blasphemous enough to characterize it as

"undue," or "unjust." The "preference" or "advantage" which Augusta then enjoyed over Social Circle, instead of being denounced as "undue or unreasonable," was recognized as justly due to Augusta, on account of her natural advantages of location, and every one regarded it as perfectly "reasonable" that she should enjoy the blessings which God had given her.

When the Georgia Railroad was constructed from Augusta to Social Circle, that company *recognized* the "preference or advantage" which the Almighty had shown to Augusta; but so far from doing anything to increase the "prejudices or disadvantages," under which Social Circle then labored, the company reduced the rate from Augusta to Social Circle exactly one-half, viz., from $1.20 per one hundred pounds (the wagon rate) to 60 cents per one hundred pounds (the charter rate).

On September 15, 1845, the Georgia Railroad was completed to a place called Marthasville, which was incorporated in 1847, and its name changed to the "City of Atlanta."

In December, 1849, the W. & A. R. R. was completed from Atlanta to Chattanooga.

In 1854 the Nashville & Chattanooga Railroad was completed from Chattanooga to Nashville, Tenn.

In 1859 the Louisville & Nashville Railroad was completed from Nashville to Louisville, Ky.; and afterwards rail connection was made between Louisville and Cincinnati.

The completion of this rail route from Atlanta to Cincinnati had the effect to change the *relative* geographical relation which had previously existed between Social Circle and Augusta with respect to Cincinnati; so that Social Circle became geographically nearer than Augusta, to Cincinnati. And, had there been nothing else in the case, Social Circle would have become equitably entitled to lower rates than Augusta.

But Augusta can purchase first class freight in Baltimore, with a rail and water rate of only 89 cents per one hundred

pounds, or, with an all rail rate of only 96 cents per one hundred pounds, from there to Augusta. (Transcript, page 135.) It is impossible, therefore, to prevent Augusta from getting first class freight at less rates than Social Circle, even if the rate from Cincinnati to Social Circle were reduced to $1.07, as ordered by the Commission.

The *geographical* relation now existing between Social Circle and Augusta with respect to Cincinnati, is of no consequence, *so long as Augusta can use Baltimore, as a base of supplies.* The question is one of *strategical* rather than of *geographical* relations; and Augusta still has a better *strategical* position than Social Circle can possibly attain.

Again: Augusta can obtain a first class rail and water rate from Cincinnati via Baltimore and Savannah of $1.34 per hundred pounds.

Transcript, page 135.

The order of the Commission required the appellant railroad companies to desist from making any greater charge in the aggregate on first class freight from Cincinnati to Social Circle than they charge on such freight from Cincinnati to Augusta.

Transcript, page 21.

The appellants could obey the order of the Commission by lowering the rate from Cincinnati to Social Circle from $1.37 to to $1.07, if their financial condition would permit such a reduction of rates; or they could obey the order by raising the rate from Cincinnati to Augusta from $1.07 to $1.37, if competition would allow them to do so. But, inasmuch as Augusta can get a competing rail and water rate from Cincinnati, via Baltimore and Savannah, of $1.34, it is evident that it is impossible for the appellants to raise the rail rate from Cincinnati, via Atlanta, to Augusta, to $1.37.

If appellants should publish a tariff proposing to charge $1.37

per hundred pounds on first class goods from Cincinnati, via Atlanta, to Augusta, all such traffic as could move from Cincinnati, would go via Baltimore and Savannah, to Augusta, and be entirely lost to the appellants. But the real, practical effect of such a schedule would be to drive Cincinnati entirely out of the Augusta market, and to give Baltimore a monopoly of that market. Baltimore now has an all-rail rate to Augusta of only 96 cents per hundred pounds on first class freight, while the all-rail rate from Cincinnati, via Atlanta, to Augusta is $1.07 per hundred pounds. Cincinnati, with the present difference of 11 cents per hundred pounds against her, has so far been able to compete with Baltimore in the Augusta market; but if the difference against Cincinnati should be increased from 11 cents to 41 cents per hundred pounds, Baltimore would certainly drive Cincinnati out of the Augusta market.

The result would be:

First: Cincinnati would be driven out of the Augusta market.

Second: Appellants' lines of railroad would be deprived of all the traffic which they have heretofore carried from Cincinnati to Augusta.

Third: Augusta would be deprived of the benefit which she has heretofore enjoyed of having Cincinnati compete with Baltimore in the Augusta market.

Fourth: Baltimore would have a practical monopoly as against Cincinnati; but Augusta would continue to have a lower rate than Social Circle could get, either from Cincinnati or from Baltimore.

Fifth: In no event could the relative position of Social Circle, as compared with Augusta, be in any way improved.

In the case of the *Interstate Commerce Commission* vs. *B. & O. R. R. Co.*, 145 U. S., p. 281, Mr. Justice Brown, in discussing what would be the effect of requiring the B. & O. R. R. Co. to withdraw the "party-rate" tickets from sale, said:

"If these tickets were withdrawn the defendant road would

lose a large amount of travel, and the single-trip passenger would gain absolutely nothing." And so, in this case, if the appellant railroads were ordered to raise the joint through rate from Cincinnati to Augusta, to the combination rate now charged from Cincinnati to Social Circle, while the appellant roads would lose a large amount of traffic, Social Circle "would gain absolutely nothing."

In considering the question of undue preference as between Augusta and Social Circle, it must be borne in mind that while Social Circle has the advantage of being nearer than Augusta, to Cincinnati, Augusta has the advantage of having at least two actively competing routes from Cincinnati. In the case of the *Executors of Phipps* vs. *L. & N. W. R'y Co.*, Law Rep. (1892), 2 Q. B., p. 242, the English Court of Appeals used this language:

"It is said that it is unfair to the trader who is nearer the market, that he should not enjoy the full benefit of the advantage to be derived from his geographical situation, at a point on the railway nearer the market, than his fellow-trader, who trades at a point more distant; but I cannot see, looking at the matter as between the two traders, why the advantageous position of the one trader in having his works so placed *that he has two competing routes*, is not as much a circumstance to be taken into consideration, as the geographical position of the other trader, who, though he has not *the advantage of competition*, is situated at a point on the line geographically nearer the market."

"Why the local situation, in regard to its proximity to the market, is to be the only consideration to be taken into account, in dealing with the question, as a matter of what is reasonable and right as between the two traders, I cannot understand. Of course, if you are to exclude this from consideration altogether, *the result must inevitably be to deprive the trader who has the two competing routes of a certain amount of advantage which he derives from that favorable position of his works.*" [P. (242).]

XXXIII.

Social Circle Has Made No Complaint in This Case of Discrimination, Nor of Undue Prejudice.

The only complaint brought before the Commission was filed by the James & Mayer Buggy Company of Cincinnati. That company did complain that the joint through rate from Cincinnati to Augusta, being lower than the combination rate from Cincinnati to Social Circle, constituted a violation of the long and short haul clause of the 4th section; but it was not alleged in the petition, nor was there any testimony before the Commission, that the lower rate to Augusta constituted a discrimination under the 2d section, or an undue prejudice under the 3d section, as against Social Circle.

In *Hozier* vs. *Caledonian R'y Co.*, it was said by the Lord President that in order to raise the question of undue preference the parties must stand in *pari passu;* and that they must be brought "*into competition*, in order to give them an interest to complain."

See 1 Nev. & Mac., page 30; 145 U. S., page 282, *I. C. C.* vs. *B. & O. R. R. Co.*

There was no evidence before the Commission that there was any competition between Social Circle and Atlanta; and, if there had been, there was no evidence that the James & Mayer Buggy Co. was located at Social Circle; or that it had any property, or business interests at that place; in fact, said company's works are at Cincinnati.

We concede that the James & Mayer Buggy Co. has such title or interest as authorizes it to maintain proceedings for the violation of the long and short haul clause of the fourth section with reference to shipments of first class freight from Cincinnati; but we deny that said company has any such title or interest as authorizes it to maintain proceedings for the alleged violations of

the 2d and 3d sections of the Act in regard to the relative rights of Social Circle and Augusta.

XXXIV.

The History of the Fourth Section of the Act to Regulate Commerce.

The English Railway Statutes, passed prior to the Act to regulate commerce, contain no provision similar to the 4th section of that Act.

On January 6, 1886, Hon. John H. Reagan introduced in the House of Representatives H. R. 2412, known as the "Reagan Bill."

Cong. Rec., Vol. 17, page 286.

On March 8, 1886, Mr. Reagan reported as a substitute for H. R. 2412, a bill known as H. R. 6657.

Cong. Rec., Vol. 17, page 2196.

On January 18, 1886, Senator Cullom introduced in the Senate S. 1093, known as the "Cullom Bill."

Cong. Rec., Vol. 17, page 698.

On Feb. 16, 1886, Senator Cullom reported as a substitute for Senate Bill 1093, a bill known as S. 1532. Cong. Rec., Vol. 17, page 1464.

Senate Bill 1532 was debated, and amended, and passed the Senate on the 12th day of May, 1886. Cong. Rec., Vol. 17, p. 4396 to 4423.

The bill was debated and amended in the House. The result of the amendment by the House was, that all of Senate Bill 1532 was stricken out, except the enacting clause, and, in lieu thereof, House Bill 6657 was inserted.

Cong. Rec., Vol. 17, page 7277. Remarks by Mr. Reagan.

The Senate refused to concur in the House amendment, and a Conference Committee was appointed. The Committee on Conference met, and recommended that the House recede from its amendment, and agree to the bill of the Senate, with an amendment thereto, in the nature of a substitute, and that the Senate agree to the same.

The Conference Bill was passed by the Senate January 14, 1887; it was passed by the House January 21, 1887; it was approved by the President February 4, 1887; and became what is now known as the Act to regulate commerce.

The "Reagan Bill" contained no provision for the appointment of an Interstate Commerce Commission. The Commission was created by the "Cullom Bill."

The fourth section of the "Reagan Bill," H. R. 6657, was as follows:

"That it shall be unlawful for any person or persons engaged in the transportation of property as provided in the first section of this act to charge or receive any greater compensation for a similar amount and kind of property, for carrying, receiving, storing, forwarding, or handling the same, *for a shorter than for a longer distance, which includes the shorter distance, on any one railroad;* and the road of a corporation shall include all the road in use by such corporation, whether owned or operated by it under a contract, agreement, or lease by such corporation."

It will be noticed that where there was a similar amount and kind of property transported, and where the longer distance included the shorter distance, the fourth section of H. R. 6657 contained a prohibition against charging more for a shorter than for a longer distance, which was absolute and unconditional; and that no provision was made for relief by a commission.

As the "Reagan Bill," H. R. 6657, was rejected, it is evident that Congress did not intend to enact an absolute and unconditional prohibition against charging more for a shorter than for a

the 2d and 3d sections of the Act in regard to the relative rights of Social Circle and Augusta.

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As the "Reagan Bill," H. R. 6657, was rejected, it is evident that Congress did not intend to enact an absolute and unconditional prohibition against charging more for a shorter than for a

longer distance, even where the longer distance included the shorter.

The long and short haul clause, as it originally appeared, in the "Cullom Bill," S. 1532, was as follows: "That it shall be unlawful for any common carrier to charge or receive any greater compensation in the aggregate for the transportation of passengers or property subject to the provisions of this Act for a shorter than for a longer distance over the same line, in the same direction, and from the same original point of departure: *provided, however*, that upon application to the Commission appointed under the provisions of this Act, such common carrier may, in special cases, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time make general rules covering exceptions to any such common carrier, in cases where there is competition by river, sea, canal, or lake, exempting such designated common carrier in such special cases from the operations of this section of this act; and when such exceptions shall have been made and published they shall have like force and effect as though the same had been specified in this section."

It will be noticed that the prohibition against charging more for a shorter than for a longer distance, as it originally appeared, in the 4th section of the "Cullom Bill" S. 1532, was as absolute and unconditional as the prohibition contained in the "Reagan Bill," H. R. 6657; and that the only material difference between the 4th section of the "Cullom Bill," S. 1532, and the 4th section of the "Reagan Bill," H. R. 6657, was, that under the 4th section of the "Cullom Bill," S. 1532, the carrier might obtain permission from the Commission to make the greater charge for the shorter distance. But, unless the carrier obtained such permission from the Commission, the prohibition against making a greater charge for a shorter distance was as absolute and unconditional under the 4th section of the "Cullom Bill," S. 1532, as it was under the 4th section of the "Reagan Bill," H. R. 6657.

Counsel for the Commission argued in the Court of Appeals, and they may repeat the argument here, that under the 4th section of the Act to regulate commerce, as finally passed, a carrier can *in no case* of competion lawfully charge more for a shorter than for a longer distance, unless he shall have previously obtained the permission of the Commission. Their argument was that even competition by water will not justify a carrier in making a greater charge for a shorter than for a longer distance, unless the permission of the Commission be previously obtained. If their argument be sound, it is very strange that Congress did not adopt the 4th section as it originally appeared in the "Cullom Bill," S. 1532.

XXXV.

History of Fourth Section, Continued.

The long and short haul clause of the "Cullom Bill," S. 1532, as it passed the Senate, January 14th, 1887, was as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, and from the same original point of departure or to the same point of arrival; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge and receive as great compensation for a shorter as for a longer distance: *provided, however*, that upon application to the Commission appointed under the provisions of this Act, such common carrier may, in special cases, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time make general rules exempting such designated common carrier in such special cases from the operation of this section of this Act; and when such exceptions shall have been made and published they shall until changed by

the Commission or by law, have like force and effect as though the same had been specified in this section."

It will be noticed that the words, "*under substantially similar circumstances and conditions*," were then introduced into the 4th section, for the first time.

Judge Cooley states that on May the 12th, 1886, a motion was made by Senator Camden to change the phraseology of the first part of the section, so that it should read, "of like kind of property under *substantially similar circumstances and conditions*."

1 I. C. C. Rep., page 78, *in re L. & N. R. R. Co.*

Senator Camden's motion on May 12, 1886, was to insert the words "for the transportation of passengers, or of the like kind of property subject to the provisions of this Act."

Senator Allison said that it seemed to him that the true amendment "would be *to put in a substantial reference to the second section* of the bill;" and that it would be better to insert "'that it shall be unlawful to charge or receive any greater compensation in the aggregate for the transportation of passengers or property, *as provided by the second section of this Act*,' which clearly indicates the *conditions and circumstances*, etc., which will regulate the different classes."

Senator Harris announced that the Senator from West Virginia (Mr. Camden) was ready "to ask the unanimous consent of the Senate to withdraw the amendment he had heretofore offered and to offer this, which is satisfactory to the Committee and also to the Senator from Rhode Island, who moved the amendment:—'of like kind of property *under substantially similar circumstances and conditions*,'—*adopting the language of the second section* instead of the language adopted by the Senator from Rhode Island in his amendment."

It will be seen from the foregoing extracts from the proceedings of the Senate on May 12, 1886, that the words "*under substantially similar circumstances and conditions*," as they appeared in the 4th section of the Act, when it passed the Senate, *were adopted into that section from the 2d section of the Act.*

Judge Cooley refers to the fact that when the Senate bill (S. 1532) went to the House of Representatives, with the 4th section containing the words, "under substantially similar circumstances and conditions," the House Committee on Commerce proposed to substitute for it the "Reagan Bill" H. R. 6657, the 4th section of which contained an absolute and unconditional prohibition against charging more for a shorter than for a longer distance, and which section is quoted in full *ante*, Section XXXIV.

1 I. C. C. Rep., p. 76; In Re L. & N. R. R.

Judge Cooley refers to the fact that the Conference Committee of the two houses reported the 4th section amended so as to read as it now stands; and he adds that:

"The work of the Conference Committee was very elaborately and carefully performed. The two bills which were referred to it presented very clearly the views which had prevailed in the two houses respectively, on the general subject of relative charges on long and short haul traffic—the House view of an inflexible rule, forbidding absolutely the greater charge for the shorter haul, and the Senate view *that the rule should be subject to exceptions when the circumstances and conditions required it.* The Conference Committee accepted deliberately the Senate view, and presented it, in the report to the two houses. In the Senate the report, before adoption, was discussed, and what was proposed by it on this point of vital interest was very distinctly brought out and made prominent; and in the House, where also the report was adopted, nothing which was said by any one indicated that the situation was otherwise understood.

"It is impossible to resist the conclusion that in finally rejecting the 'long and short haul clause' of the House Bill, which prescribed an inflexible rule, not to be departed from in any case, and retaining in substance the 4th section as it had passed the Senate, both houses understood that they were not adopting a measure of strict prohibition in respect to charging more for the shorter than for the longer distance, but that they were, instead, *leaving the door open for exceptions in certain cases*, and, among others, in cases where *the circumstances and conditions of the traffic were affected* BY THE ELEMENT OF COMPETITION, and where exceptions might be a necessity if the competition was to continue. And water competition was beyond doubt especially in view."

1 I. C. C. Rep., pp. 77–78. In Re L. & N. R. R.

XXXVI.

History of Fourth Section, Continued.

As counsel for the Commission will doubtless argue here, as they did in the Court below, that a carrier can in no case of competition lawfully charge more for a shorter than for a longer distance, unless he shall have previously obtained the permission of the Commision, and as we insist that such an argument practically ignores the fact that Congress refused to pass the 4th section of the "Cullom Bill," S., 1532, as it originally appeared, and in lieu thereof adopted from the 2d section of the Act the phrase "under substantially similar circumstances and conditions," we here print, for the convenience of the Court, the 4th section of the "Cullom Bill," S., 1532, as it originally appeared, and the 4th section of the Act to Regulate Commerce, as it was finally passed.

4TH SECTION OF THE "CULLOM BILL," S. 1532, AS IT ORIGINALLY APPEARED.

"That it shall be unlawful for any common carrier to charge or receive any greater compensation in the aggregate for the transportation of passengers or property subject to the provisions of this Act for a shorter than for a longer distance over the same line, in the same direction (and from the same original point of departure): Provided, however, that upon application to the Commission appointed under the provisions of this Act, such common carrier may, in special cases, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time (make general

4TH SECTION OF THE ACT TO REGULATE COMMERCE, AS IT WAS FINALLY PASSED.

"That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or *of like kind of* property, *under substantially similar circumstances and conditions*, for a shorter than for a longer distance over the same line, in the same direction, *the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge and receive as great compensation for a shorter as for a longer distance:* Provided, however, That upon application to the Commission appointed under the provisions of

rules covering exceptions to any such common carrier, in cases where there is competition by river, sea, canal, or lake, exempting such designated common carrier in such special cases from the operation of this section of this Act; and when such exceptions shall have been made and published they shall have like force and effect as though the same had been specified in this section.")

this Act, such common carrier may, in special cases, *after investigation by the Commission*, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time *prescribe the extent to which such designated common carrier may be relieved* from the operation of this section of this Act."

The words in parentheses in the 4th section of the "Cullom Bill," S., 1532, as it originally appeared, were omitted from the 4th section of the Act, as it was finally passed; and the words italicised in the 4th section of the Act, as it finally passed, were not contained in the 4th section of the "Cullom Bill," S., 1532, as it originally appeared.

It will be noticed that the 4th section of the "Cullom Bill," S. 1532, as it originally appeared, contained a prohibition against making a greater charge for the shorter distance, which was as absolute and unconditional as the prohibition contained in the "Reagan Bill," H. R. 6657; and that under the 4th section of the "Cullom Bill," S. 1532, as it originally appeared, the carrier could, in no case, lawfully charge more for a shorter than for a longer distance, unless he had first obtained permission from the Commission to make the greater charge.

But when the 4th section of the Act, as finally passed, so restricted the prohibition, that it did not apply in any case *where the transportation was not conducted "under substantially similar circumstances and conditions,"* there was no longer any necessity for the carrier to apply to the Commission, where the circumstances and conditions were substantially *dis*similar.

Any other construction fails to give any effect whatever to the important phrase, "under substantially similar circumstances and conditions," and leaves the 4th section of the Act as if those words had never been used.

To make our contention somewhat more manifest, we print in

parallel columns the material prohibitory words of the 4th Section of the Act, as finally passed, omitting from the left column the phrase, "under substantially similar circumstances and conditions."

WITHOUT THE PHRASE.	WITH THE PHRASE.
"It shall be unlawful . . . to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance."	"It shall be unlawful . . . to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property *under substantially similar circumstances and conditions* for a shorter than for a longer distance," etc.

In Re L. & N. R. R. Co., 1 I. C. C. Rep., p. 57, Judge Cooley, in speaking of the effect of the introduction into the 4th Section of the phrase, "under substantially similar circumstances and conditions," said: "that which the act does not declare unlawful must remain lawful if it was so before, and that which it fails to forbid, the carrier is left at liberty to do, without permission of anyone."

"The charging or receiving the greater compensation for the shorter than for the longer haul is seen to be forbidden only when both are under substantially similar circumstances and conditions; and therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its so doing will not alone convict it of illegality, *since if the circumstances and conditions of the two hauls are dissimilar, the statute is not violated.*"

This language of Judge Cooley was quoted approvingly by Judge Ross, in the case of *I. C. C.* vs. *A., T. & S. F. R. R. Co.*, 50 Fed. Rep., 300, 301.

XXXVII.

The Phrase, "Under Substantially Similar Circumstances and Conditions," as Used in the Second Section.

The second section provides:

"That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic *under substantially similar circumstances and conditions*, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

24 U. S. Stat. At Large, pp. 379, 380.

It will be noticed that the act to regulate commerce contains no provision for an application to the Commission for relief against the second section.

Judge Cooley, after quoting the second section, said:

"Here it will be observed that the phrase is precisely the same (as in the fourth section), and there can be no doubt that the words were carefully chosen, probably because they were believed to express more accurately and precisely than would any others the exact thought which was in the legislative mind. And in this section, as well as in Section 4, the phrase is employed to mark the limit of the carrier's privilege; its privilege, too, in respect of the very subject-matter with which Section 4, where it is employed, has to do, namely, the charges for transportation service. It is not at all likely that Congress would deliberately, in the same act and when dealing with the same subject, make use

of a phrase which was not only carefully chosen and peculiar, but also controlling, in such different senses that its effect as used in one place upon the conduct of the parties who were to be regulated and controlled by it, would be essentially different from what it was as used in another. But beyond question the carrier must judge for itself what are the 'substantially similar circumstances and conditions' which preclude the special rate, rebate, or drawback, which is made unlawful by the second section, since no tribunal is empowered to judge for it until after the carrier has acted, and then only for the purpose of determining whether its action constitutes a violation of law. The carrier judges on peril of the consequences; but the special rate, rebate or drawback which it grants is not illegal when it turns out that the circumstances and conditions were not such as to forbid it; and as Congress clearly intended this, it must also, when using the same words in the fourth section, have intended that the carrier whose privilege was in the same way limited by them, should in the same way act upon its judgment of the limiting circumstances and conditions."

1 I. C. C. Rep., pp. 59, 60, *In Re L. & N. R. R. Co.*

XXXVIII.

The Meaning of the Words, "Similar Circumstances and Conditions," as Used in the Second and Fourth Sections.

This Court, in construing the second and third sections, said:

"In this connection we quote with approval from the opinion of Judge Jackson in the court below: 'To come within the inhibition of said section, the differences must be made *under like conditions;* that is, there must be contemporaneous service in the transportation of like kinds of traffic *under substantially the same circumstances and conditions.* In respect to passenger traffic, *the positions of the respective persons, or classes, between whom differences in charges are made, must be compared with each other*, and there must be found to exist *substantial identity of* SITUATION *and of service*, accompanied by irregularity and

partiality, resulting in undue advantage to one, or undue disadvantage to the other, in order to constitute unjust discrimination.'"

145 U. S., p. 282, *I. C. C.* vs. *B. & O. R. R.*

In the same case at Circuit:

Judge Jackson said, that the English cases "establish the rule that in passing upon the question of undue or unreasonable preference or disadvantage, it is not only legitimate, but proper, to take into consideration, besides the mere differences in charges, various elements, such as *the convenience of the public, the fair interests of the carrier*, the relative quantities or volume of the traffic involved, the relative cost of the services and *profit to the company, and the* SITUATION *and circumstances of the respective customers with reference to each other as* COMPETITIVE *or otherwise.*"

43 Fed. Rep., pp. 53, 54, *I. C. C.* vs. *B. & O. R. R. Co.*

If, as said by this Court in construing the second and third sections, the circumstances and conditions include those of "SITUATION" as well as of service; and if, as said by Judge Jackson, the situation and circumstances include those which are "*competitive*," as well as those which are not; then, as said by Judge Cooley:

"It is not at all likely that Congress would deliberately, in the same Act and when dealing with the same general subject, make use of a phrase which was not only carefully chosen and peculiar, but also controlling, in such different senses that its effect as used in one place upon the conduct of the parties who were to be regulated and controlled by it, would be essentially different from what it was as used in another." 1 I. C. C. Rep., 59, In Re L. & N. R. R. Co.

XXXIX.

Competition is One of the Circumstances or Conditions Contemplated by the Four.h Section.

In the case of *ex parte Koehler*, decided July 4, 1887, 31 Fed. Rep., 319, Deady, Judge, said: "Freight carried to or from a competitive point, is always carried under substantially *dis*similar circumstances and conditions from that carried to or from non-competitive points. In the latter case, the railway makes its own rates, and there is no good reason why it should be allowed to charge less for a long haul than a short one. When each haul is made from, or to, a non-competitive point, the effect of such discrimination is to build up one place, at the expense of the other. Such action is willfully unjust, and has no justification or excuse in the exigencies or conditions of the business of the corporation. In the former case the circumstances are altogether different. The power of the corporation to make a rate, is limited by the necessities of the situation. Competition controls the charge. *It must take what it can get, or abandon the field, and let its road go to rust.*

"*Competition* may not be the only circumstance that makes the condition under which a long and a short haul are performed substantially dissimilar; *but certainly it is the most obvious and effective one*, and must have been in the contemplation of Congress, in the passage of the Act." . . . .

"The places between which competition in transportation exists between water craft and railways, *or even the latter*, always will, and must, send and receive freight at lower rates than others not so favored. This is the result of natural advantage, supplemented often by exceptional sagacity and enterprise, and it would be folly in the Legislature to prevent it, if it could. As

long as people and places differ so widely in capabilities and facilities, social or business equality is impossible. Society can do no more than to give each one an even chance, and a fair show, to make the most of his, or its opportunities, and leave the result to circumstances over which it has little if any control."

Page 321.

In the case of M. P. R'y Co., decided June 21, 1887, 31 Fed. Rep., 862, Judge Pardee said: "That *competition*, the life of trade, cuts an important figure in the conditions and circumstances attendant upon transportation of property and passengers, cannot well be overlooked nor denied. Nor can it well be denied, *that, as between the short and long haul, competition may exist to that extent that what would otherwise be similar circumstances and conditions will be dissimilar circumstances and conditions.*"

In the case of *ex parte Koehler*, decided May 4, 1885, 23 Fed. Rep., p. 533, Judge Deady, in speaking of the discrimination which necessarily exists whenever a greater charge is made for a shorter than for a longer distance, said:

"It is not the fault or contrivance of the railway that compels this discrimination, but it is the necessary result of circumstances altogether beyond its control. It is not done wantonly, for the purpose of putting the one place up, or the other down, but only to maintain its business against rival and competing lines of transportation. In other words, the matter, so far as the railway is concerned, resolves itself into a choice of evils. It must either compete with the boats during the season of water transportation, and carry freight below what the Legislature declared to be a reasonable rate, or abandon the field and let its road go to rust. Nor can the shipper at the non-competing point, or over the short haul, complain, so long as his goods are carried at a reasonable rate. It is not the fault of the railway that the shipper who does business at a competing point, has the advantage of it. It is a natural advantage which he (the local shipper) must submit to, unless the Legislature will undertake to

equalize the matter, by prohibiting the carriage of goods by water for a less rate than by rail."

See also *Ex parte Koehler*, 25 Fed. Rep., p. 73.
I. C. C. vs. *A. T. & S. F. R. R.*, 50 Fed. Rep. 295.
I. C. C. vs. *C. N. O. & T. P. R'y Co. et al.*, 56 Fed. Rep. 925.

In the case of *Foot* vs. *Utica & B. R. R., N. Y. Railway Commission*, Rep. 1884, Vol. 1, p. 104, cited in 21 Am. & Eng. R. R. Cases, p. 63, the New York Railroad Commission used this language:

"If the price for carrying a certain distance is not unreasonable, and yet for a greater distance, for some reason, the same price cannot be obtained, should therefore the road give up the second price entirely? Is not half a loaf better than no bread? If such a result is *forced* upon a road, those at intermediate stations would surely, in some way, be obliged to make up the sum lost, and be worse off than before." . . . "Railroads, like other corporations or individuals, must sell what they have to sell, viz., transportation, for the best price they can get, provided it is not unreasonable in the sense of extortionate or prohibitive of the articles transported." . . . "Examples can be multiplied, but this single one shows that the cost *of service is not alone to control*, but that nature of the article, quantity of shipments, *conditions of competition*, season of year, *value of service rendered*, and many other elements must be considered."

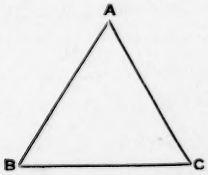
During the period from June 1, 1890, to May 31, 1891, the revenue received by the Georgia Railroad on shipments from and through Cincinnati and other Ohio and Mississippi River points to Augusta proper, was $123,524.16. Transcript, p. 292.

If the Georgia Railroad, as a result of the decision in this case, shall be forced to abandon that competitive traffic, the local stations between Atlanta and Augusta "would surely, in some way, be obliged to make up the sum lost," or the Georgia Railroad would be compelled to carry its local traffic at less than reasonable rates.

XL.

Water Competition.

The Commission, in all of its decisions, has conceded that *water* competition, or competition with *foreign* railroads, or competition with lines of railroad *wholly in a single State*, may make out the dissimilarity of circumstances and conditions in reference to the transportation of traffic, which will authorize a railroad company, without applying to the Commission, to charge less for the longer than for the shorter distance. (1 I. C. C. Rep., p. 3; *In re* Louisville & Nashville R. R. Co.; 5 I. C. C. Rep., p. 607, *Gerke Brewing Co.* vs. *L. & N. R. R. Co. et al.*; 5 I. C. C. Rep., p. 387, *Ga. R. R. Comm.* vs. *Clyde Steamship Co.*)



Suppose A, B, C, to be an equilateral triangle; that each of the sides is 100 miles long; and that the lines A B, and B C, represent a railroad.

Now, if the line A C be supposed to represent a navigable water course, the Commission concedes that the railroad A B, B C, may compete with the vessels upon the water course, without applying to the Commission, and without necessarily reducing its local rates; but if A C be supposed to be a rival railroad, which is not a foreign road, nor a road wholly within a single State, then, if the road A B, B C, desires to compete with the road A C, it must, according to the Commission, reduce all of its local rates to the competitive rate prevailing between A and C, or it must apply to the Commission for relief from the 4th section.

What good reason can possibly exist for such a distinction between water and rail competition? And what good reason can possibly exist for the distinction between different kinds of railroads?

Water transportation is generally cheaper than railroad transportation, and therefore water competition generally forces lower competitive rates.

This, however, is a mere difference in degree; and is unimportant.

The important fact is, that a competitive rate must be met, whether it be made by water craft, or by railroad. It is the fact of competition, and not the kind of competition, that creates the substantial dissimilarity in the circumstances and conditions of transportation.

One reason suggested for making the distinction between water and rail competition, is said to be that water competition is exempted from the operation of the Act to regulate commerce. But there is no *practical* force in the suggestion.

If we suppose the line A C, in the triangle referred to above, to represent a railroad 100 miles long, and the lines A B B C to represent another railroad 200 miles long, and that both are competing for traffic between A and C; the long line will be practically at the mercy of the short line, if the long line be compelled to reduce its local rates as a condition of its being allowed to meet the competitive rates of its rival. Because, even though the short line be also forced to reduce *its* local rates down to the level of the competitive rate, the loss sustained by it, in doing so, will be only one-half as great as the loss which it will inflict upon the long line, by forcing the latter to reduce its local rates. The illustration, of course, assumes that the volume of the local traffic of each line is in proportion to its mileage, and that the long line, if allowed to compete, can secure one-half of the competitive traffic.

In such a case the long line is as completely at the mercy of the short line, as if the short line was not at all subject to the Act to regulate commerce.

If the Commission had the power to compel the short line A C to charge reasonably *high* competitive rates, so as to enable both lines to realize full compensation from their competitive traffic, there might have been some reason for drawing a distinction between water and rail competition.

It is possible that when the distinction was first made by the Commission, the Commission may have supposed that it had the power to compel railway companies to maintain reasonably high rates at competitive points.

But the Commission afterwards held that the word "reasonable," as used in the first section in reference to rates, means reasonably *low*, but *not* reasonably *high*. The Commission has also held that it has no power to order competitive rates to be advanced, even where they are so low "that persistence in making them would be ruinous."

2 I. C. C. Rep., p. 231. *In re C., St. P. & K. C. R. R.*

If it be the law that one railroad subject to the Act cannot compete with another railroad subject to the Act, without reducing its local rates, and if the Commission has no power to compel a railroad to charge reasonably *high* competitive rates, then the long line is as completely at the mercy of the short line as if the short line were a navigable water-course; *and the short lines of railway will eventually secure a complete monopoly of all the competitive traffic of this country.*

If it be the law that nothing but *water* competition can be recognized, *the cities located upon the navigable water-courses will absorb the commerce of the country;* and the great interior railroad centers, such as Indianapolis, Birmingham, Atlanta, etc., must relapse into the condition of mere villages.

It is impossible to assume that Congress intended that such a construction should be placed upon the long and short haul clause, *as would give the monopoly of transportation to the short lines of railroad; and the monopoly of commerce to the cities located upon the water-courses.*

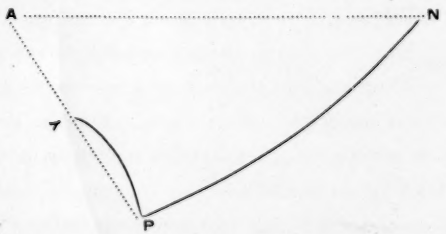
In the case of the *I. C. C.* vs. *B. & O. R. R. Co.*, this Court said that the Act was NOT *designed* "*to prevent competition* BETWEEN DIFFERENT ROADS;" thus ignoring the distinction which the Commission has attempted to draw between competition by water, and competition by railroad. (145 U. S., 276, 281.)

XLI.

Peculiar (?) Cases of Railroad Competition.

In re Louisville & Nashville R. R. Co., 1 I. C. C. Rep., 32, the Commission said, that even as between railroads which are subject to the Act, there might be *rare and peculiar* cases of competition, which would create the dissimilarity of circumstances and conditions entitling the carrier to charge less for the longer than the shorter haul.

One such case is referred to on page 81, and is sufficiently illustrated by the following diagram:



The Pennsylvania R. R. has a line running from Youngstown (Y), via Pittsburgh (P), to New York (N), which line is 510 miles long. It is represented by the solid line in the diagram.

A competing railroad route (represented by the dotted line),

runs from Pittsburgh, via Youngstown, to Ashtabula (A), and thence to New York, which line is 682 miles long. This line gives to the people of Pittsburgh and Youngstown competition with the Pennsylvania R. R., in their business to and from New York and New England.

The commission intimated that the competing line ought to be allowed to charge less from Pittsburgh to New York than from Youngstown to New York, because the application of any other rule "must be fatal to competition." (P. 82.)

The only "*peculiarity* of the competition" in that case is "that the business on the roads respectively is started in opposite directions when destined to New York; so that on east-bound traffic from Pittsburgh, the haul by one road is shorter than from Youngstown, and longer by the other."

While it may be called a "peculiarity," in one sense, it furnishes no substantial reason for distinguishing that case from the ordinary case where a long line is seeking to compete with a shorter line.

The competing line, in that case, was 172 miles longer from Pittsbugh to New York than the Pennsylvania R. R., and the competing line was asking to be allowed to compete at Pittsburgh, without being compelled to reduce its local rates from Youngstown. That was all there was in the case. The fact that the competing line runs in a northwestwardly direction, 131 miles to Ashtabula, before turning eastwardly toward New York, is of no legal consequence whatever.

A similar peculiarity exists in this case. The distance from Cincinnati to Chattanooga, by the short line (the C., N. O. & T. P. Ry.), is 335 miles. The distance from Cincinnati to Chattanooga, by the long line (the Louisville & Nashville), is 446 miles; and this line runs in a general southwestwardly direction 295 miles to Nashville, before turning southeastwardly toward Chattanooga.

The only fact of any legal consequence, either in that case, or in this, is, that if long lines are not allowed to compete with

short ones, except upon the condition of reducing their local revenue, the long lines cannot, and will not compete; and it is this fact that creates the substantial dissimilarity in circumstances and conditions, which takes a case out of the operation of the fourth section.

The Commission has quite recently overruled so much of the decision, *in re* Louisville & Nashville R. R. Co., as held that carriers were permitted to judge for themselves in the first instance of what constitutes "rare and peculiar cases of competition between railroads which are subject to the statute." But the principles laid down in that case in regard to water competition, competition with a foreign road, and competition with a road wholly within a single State, are reaffirmed.

5 I. C. C. Rep., 328, 387, *Ga. R. R. Comm.* vs. *Clyde Steamship Co.*

5 I. C. C. Rep., 607, *Gerke Brew. Co.* vs. *L. & N. R. R.*

Counsel for the Commission, in the Court of Appeals, disagreed with the Commission even as to water competitien, competition with a foreign railroad, and competition with a road wholly within a single State.

Counsel for the Commission took the broad ground, that no kind of competition, whether it be by water, or by rail, can differentiate the circumstances and conditions of transportation. Their contention was that the fourth section was intended to be "a provision against any charge of a greater sum for shorter distance, under circumstances that related to the act of *carriage alone*, together with the relieving clause, which might be applied in the discretion of the Commission alone, on due application therefor."

The decision of the Commission *in re* L. & N. R. R., holding that water competition, competition with a foreign railroad, competition with a railroad wholly within a single State, and "rare and peculiar cases of competition between railroads subject to the statute," might constitute a dissimilarity of circumstances

and conditions, was rendered June 15, 1887, (1 I. C. C. Rep., 31); and it has been adhered to by the Commission to the present day; except that after the litigation in this case began, the Commission on June 11, 1892, overruled only so much of it as referred to "rare and peculiar cases of competition between railroads subject to the statute." (5 I. C. C. Rep., 327.)

The Commission, on December 1, 1887, reported its decision *in re* L. & N. R. R. Co. to Congress; and Congress has never expressed any dissent from the proposition that the species of competition recognized by the Commission in that case may be considered as among the circumstances and conditions affecting transportation.

(See 1st An. Rep. of I. C. C., 1887, p. 64.)

For a period of nearly seven years, we have repeated decisions by the Commission, acquiesced in by Congress, that competition by water, competition with a foreign railroad, competition with a road wholly within a single State, and "rare and peculiar cases of competition between railroads subject to the statute," may be considered in ascertaining the circumstances and conditions under which transportation is conducted, and we submit that it is now quite too late for either the Commission, or its counsel, to undertake to repudiate a principle which has been so long recognized.

The Commission was right as far as it went. It committed an error in not going far enough; and in attempting the impossible task of drawing a sound distinction between the different kinds of competition, as affecting transportation.

XLII.

Competition Between Market and Market, and Between Product and Product.

The rail and water rate on buggies, carriages, and other first class freight, from Baltimore to Augusta, is 89 cents per 100 pounds; and the all-rail rate from Baltimore to Augusta, is 96 cents per 100 pounds.

Transcript, p. 135.

The rate from Cincinnati to Augusta, on the same class of freight, is $1.07 per 100 pounds.

Transcript, page 15.

Buggies, carriages, and other similar vehicles are shipped to Augusta, from Baltimore, and other Eastern cities, as well as from Cincinnati.

Transcript, page 289.

One of the defenses relied upon in this case is, that at Baltimore, and other Eastern cities, large manufactories of buggies, carriages, etc., exist, and that the product of those factories is transported to Augusta at such rates, that if the appellants charge a higher rate than $1.07 per 100 pounds from Cincinnati to Augusta, no freight of that character would come over their roads; for the product of the Eastern factories would be delivered in Augusta, at a rate which would exclude the Cincinnati product from the Augusta market.

The Commission held, in effect, that competition between market and market, or between product and product, cannot be considered as affecting the circumstances and conditions under which transportation is conducted.

The Commission, in its opinion, said: "If the contention of the defendants is justified by the statute, and they can avail

themselves of its exceptional provision, and charge more for the shorter distance, for the purpose of equalizing commercial conditions and adjusting trade relations between the cities of Cincinnati and Baltimore in the Augusta market, the same thing may be done to place Cincinnati carriage makers on an equal footing with those of Augusta in the Augusta market, or to relieve any city from any disadvantage in markets of other cities, or to dedeprive all cities of production of any advantage resulting from their location. Such an interpretation would make the fourth section of the Act practically inoperative, and, with such a license in rate making, carriers might give advantage to or build or destroy the carriage or other business of any city or locality."

Transcript, page 19.

First: Before it can, with propriety, be affirmed that the contention of the appellants "would make the fourth section of the Act practically inoperative," it will be necessary to decide what the fourth section means.

If the fourth section of the "Reagan Bill," H. R. 6657, had been passed, or if the fourth section of the "Cullom Bill," S. 1532, had been passed as it stood prior to May 12, 1886, then we concede that the appellant's contention would have made either of those sections practically inoperative; because neither of them permitted any consideration of the "circumstances and conditions" under which transportation service may be conducted. But Congress rejected both of those sections; and the fourth section, as passed, in effect, declares that it is not to be operative in any case, except where the circumstances and conditions are substantially similar.

The fourth section *is* "practically inoperative" in this case. It is inoperative, however, not because of the appellants' contention, but because the section itself, in effect, declares that it shall be "practically inoperative" in every case where the circumstances and conditions are not substantially similar.

Second: As to the suggestion of the Commission that the ap-

pellants have no right "to equalize the commercial conditions," or "adjust the trade relations," *between the cities of Cincinnati and Baltimore* in the Augusta market, it is sufficient to reply that the appellants have not assumed to exercise any such power. The "commercial conditions" and "trade relations" existing *between Baltimore and Augusta* are fixed by water competition, which the appellants cannot control; and which the Commission itself cannot control. The appellants have simply recognized those "commercial conditions" and "trade relations" as they found them existing between Baltimore and Augusta; and, without attempting to interfere with them in the least, the appellants undertook to aid in establishing such "commercial conditions" and "trade relations" *between Cincinnati and Augusta* as would give to Augusta the benefit of a new market in which to purchase, to Cincinnati a new market in which to sell, and to the appellant railroad companies a new traffic for them to carry.

If the appellant railroad companies can obtain rates for carrying the traffic which are reasonably remunerative to them, and if Cincinnati shippers, after paying those rates, can sell their products in the Augusta market at a profit reasonably remunerative to them, *why should the Commission interfere* with the traffic *between Cincinnati and Augusta?* Who is to be benefited by such interference except the city of Baltimore? And Baltimore, with the ocean and the Savannah River, is amply able to take care of herself.

We fail to find that the Act to regulate commerce has conferred upon the *Commission* any power to interfere with the "commercial conditions," or the "trade relations," *which exist between Cincinnati and Augusta.* And yet that is exactly what the Commission, in effect, did in this case; and it was done without giving either of those cities an opportunity to be heard.

Third: As to the suggestion of the Commission that the contention of the Appellants would imply the right to place Cincinnati carriage makers on an equal footing with those of Augusta in the Augusta market; we submit that if the capital, skilled

labor, and raw material, for the manufacture of carriages, can be obtained in Cincinnati, upon such terms that the Cincinnati carriage makers, after paying transportation rates, which are reasonably remunerative to the Appellant carriers, can sell their vehicles in the Augusta market, "on an equal footing" with the Augusta carriage makers, it is perfectly right that they should be allowed to compete with the home manufacturers in Augusta.

The same argument of the Commission which would exclude the Cincinnati carriage makers, would also exclude the Baltimore carriage makers, from the Augusta market.

If steamships, steamboats, and sailing vessels may lawfully carry buggies, and other vehicles, from Baltimore, at rates which will enable the Baltimore carriage makers to compete with the Augusta carriage makers, in the Augusta market, why may not the Appellant carriers lawfully carry vehicles at rates which will enable the Cincinnati carriage makers to compete with the Augusta carriage makers, in the same market?

The argument of the Commission would have the effect to build a Chinese wall around every town and city in the Union.

Fourth: As to the suggestion of the Commission that the Appellants, in effect, claim the right to give to a city advantages to which it is not fairly entitled, or to deprive a city of advantages to which it is entitled by reason of its location; we submit that the Appellants have neither exercised, nor claimed any such right.

If the Appellants should carry freight from Cincinnati to Atlanta, for less than its cost of carriage, they would be guilty of giving to Cincinnati an undue preference, which would operate as an unjust prejudice against Baltimore. But as the rates charged by the Appellants on first class freight from Cincinnati to Augusta, are reasonably remunerative, it is not giving to Cincinnati an undue preference, to allow her to avail herself of those rates.

On the contrary, it would be subjecting Cincinnati to undue prejudice, if the Appellants were to refuse to carry her traffic to

Augusta, at rates fairly remunerative to the carriers; and it would also subject Augusta to undue prejudice to deprive her of the benefit of the competition afforded by the introduction of the Cincinnati products into her markets.

See *Phipps* vs. *N. W. Ry.*, Law Rep., 1892, 2 Q. B., 242, 244, 245.

Augusta is entitled, by reason of her natural location, to the benefit of the existing competition between Cincinnati and Baltimore. And as to depriving Baltimore of the advantages resulting from her location, it can never be done by any one, so long as the ocean continues subservient to her commerce.

XLIII.

In discussing the distinction which the Commission has attempted to draw between *water* competition, and *rail* competition, we have heretofore shown that it is *the fact* of competition, and not *the kind* of competition, that constitutes the substantial dissimilarity in circumstances and conditions; and all that we have said in reference to that distinction is equally applicable to the attempted distinction between the *competition of carriers*, and the *competition of markets*.

The Hudson River Railroad runs up the eastern shore of the Hudson River, from New York to Albany. The West Shore Railroad runs up the western shore of that river, from Jersey City to Albany.

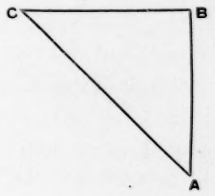
Now, according to the "water" theory of the Commission, either of said railroads may compete with the Hudson River; but neither of them can compete with the other.

According to the "market" theory of the Commission, each road, as against the river, may compete for traffic on its own side of the river; but neither of them can do anything to promote the traffic upon its own side of the river, in competition with the traffic upon the other side of the river.

Such refinements may be interesting, but they can not pro-

perly find a place in the construction of a statute intended for the practical administration of the most important commercial interests of the country.

The following diagram will serve to show at a glance the fallacy of the refinements attempted by the Commission:



Suppose the lines A C, C B, to represent a joint through rail line running from Augusta (A), via Cincinnati (C), to Baltimore (B); and suppose the line A B to represent the ocean and river route from Baltimore to Augusta. Under that hypothesis the Commission concedes that the joint through rail line may compete with the water route, without necessarily reducing the rates charged by the railroads between Cincinnati and Augusta.

The present rail and water rate of 89 cents per 100 pounds from Baltimore to Augusta could not be much exceeded by the joint through rail line, in face of the water competition afforded by the ocean and river route, A B.

Transcript, p. 135.

The Commission declined to disturb the present rate of $1.07 per 100 pounds from Cincinnati to Augusta, and therefore we assume that it was regarded as just and reasonable.

The railroads between Cincinnati and Augusta could, therefore, lawfully charge $1.07 from Cincinnati to Augusta, notwithstanding the joint through rail line might charge a joint through rate of only 89 cents from Baltimore to Augusta. The railroads between Cincinnati and Augusta would be charging more for a shorter distance, than the joint through rail line would be charging for a longer distance; but as it would be done to meet the

water competition afforded by the route A B, the Commission, in effect, concedes that it would be justified.

The citizens of Augusta would then, as now, have the choice of purchasing in the Baltimore market with a rate of 89 cents, or in the Cincinnati market with a rate of $1.07.

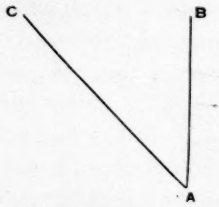
Augusta would have the benefit, as she does now, of the competition afforded by the rival markets of Cincinnati and Baltimore; and Cincinnati and Baltimore would enjoy the privilege of competing in the Augusta market, upon the same relative terms as they now enjoy.

The railroads between Augusta and Cincinnati (represented by the line A C) would compete for the business of Cincinnati, as against the business of Baltimore, precisely as the appellants in this case now do; and at precisely the same rates.

All of this could be done with perfect legality, according to all of the decisions heretofore made by the Commission.

The diagram is a substantially fair representation of what would be the situation in this case, if the Baltimore & Ohio R. R. (from Baltimore to Cincinnati), the C., N. O. & T. P. R'y (from Cincinnati to Chattanooga), the W. & A. R. R. (from Chattanooga to Atlanta), and the Georgia R. R. (from Atlanta to Augusta), should agree, as they might do, to form a joint through rail line from Baltimore to Augusta, with a joint through rate of 89 cents from Baltimore, as against a rate of $1.07 charged by the railroads between Cincinnati and Augusta.

Now let us change the diagram by simply omitting the line C. B., and it would appear as follows:



The withdrawal of the B. & O. R. R. from the joint through

and conditions, was rendered June 15, 1887, (1 I. C. C. Rep., 31); and it has been adhered to by the Commission to the present day; except that after the litigation in this case began, the Commission on June 11, 1892, overruled only so much of it as referred to "rare and peculiar cases of competition between railroads subject to the statute." (5 I. C. C. Rep., 327.)

The Commission, on December 1, 1887, reported its decision *in re* L. & N. R. R. Co. to Congress; and Congress has never expressed any dissent from the proposition that the species of competition recognized by the Commission in that case may be considered as among the circumstances and conditions affecting transportation.

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Second: As to the suggestion of the Commission that the ap-

pellants have no right "to equalize the commercial conditions," or "adjust the trade relations," *between the cities of Cincinnati and Baltimore* in the Augusta market, it is sufficient to reply that the appellants have not assumed to exercise any such power. The "commercial conditions" and "trade relations" existing *between Baltimore and Augusta* are fixed by water competition, which the appellants cannot control; and which the Commission itself cannot control. The appellants have simply recognized those "commercial conditions" and "trade relations" as they found them existing between Baltimore and Augusta; and, without attempting to interfere with them in the least, the appellants undertook to aid in establishing such "commercial conditions" and "trade relations" *between Cincinnati and Augusta* as would give to Augusta the benefit of a new market in which to purchase, to Cincinnati a new market in which to sell, and to the appellant railroad companies a new traffic for them to carry.

If the appellant railroad companies can obtain rates for carrying the traffic which are reasonably remunerative to them, and if Cincinnati shippers, after paying those rates, can sell their products in the Augusta market at a profit reasonably remunerative to them, *why should the Commission interfere* with the traffic *between Cincinnati and Augusta?* Who is to be benefited by such interference except the city of Baltimore? And Baltimore, with the ocean and the Savannah River, is amply able to take care of herself.

We fail to find that the Act to regulate commerce has conferred upon the *Commission* any power to interfere with the "commercial conditions," or the "trade relations," *which exist between Cincinnati and Augusta.* And yet that is exactly what the Commission, in effect, did in this case; and it was done without giving either of those cities an opportunity to be heard.

Third: As to the suggestion of the Commission that the contention of the Appellants would imply the right to place Cincinnati carriage makers on an equal footing with those of Augusta in the Augusta market; we submit that if the capital, skilled

labor, and raw material, for the manufacture of carriages, can be obtained in Cincinnati, upon such terms that the Cincinnati carriage makers, after paying transportation rates, which are reasonably remunerative to the Appellant carriers, can sell their vehicles in the Augusta market, "on an equal footing" with the Augusta carriage makers, it is perfectly right that they should be allowed to compete with the home manufacturers in Augusta.

The same argument of the Commission which would exclude the Cincinnati carriage makers, would also exclude the Baltimore carriage makers, from the Augusta market.

If steamships, steamboats, and sailing vessels may lawfully carry buggies, and other vehicles, from Baltimore, at rates which will enable the Baltimore carriage makers to compete with the Augusta carriage makers, in the Augusta market, why may not the Appellant carriers lawfully carry vehicles at rates which will enable the Cincinnati carriage makers to compete with the Augusta carriage makers, in the same market?

The argument of the Commission would have the effect to build a Chinese wall around every town and city in the Union.

Fourth: As to the suggestion of the Commission that the Appellants, in effect, claim the right to give to a city advantages to which it is not fairly entitled, or to deprive a city of advantages to which it is entitled by reason of its location; we submit that the Appellants have neither exercised, nor claimed any such right.

If the Appellants should carry freight from Cincinnati to Atlanta, for less than its cost of carriage, they would be guilty of giving to Cincinnati an undue preference, which would operate as an unjust prejudice against Baltimore. But as the rates charged by the Appellants on first class freight from Cincinnati to Augusta, are reasonably remunerative, it is not giving to Cincinnati an undue preference, to allow her to avail herself of those rates.

On the contrary, it would be subjecting Cincinnati to undue prejudice, if the Appellants were to refuse to carry her traffic to

Augusta, at rates fairly remunerative to the carriers; and it would also subject Augusta to undue prejudice to deprive her of the benefit of the competition afforded by the introduction of the Cincinnati products into her markets.

See *Phipps* vs. *N. W. Ry.*, Law Rep., 1892, 2 Q. B., 242, 244, 245.

Augusta is entitled, by reason of her natural location, to the benefit of the existing competition between Cincinnati and Baltimore. And as to depriving Baltimore of the advantages resulting from her location, it can never be done by any one, so long as the ocean continues subservient to her commerce.

XLIII.

In discussing the distinction which the Commission has attempted to draw between *water* competition, and *rail* competition, we have heretofore shown that it is *the fact* of competition, and not *the kind* of competition, that constitutes the substantial dissimilarity in circumstances and conditions; and all that we have said in reference to that distinction is equally applicable to the attempted distinction between the *competition of carriers*, and the *competition of markets*.

The Hudson River Railroad runs up the eastern shore of the Hudson River, from New York to Albany. The West Shore Railroad runs up the western shore of that river, from Jersey City to Albany.

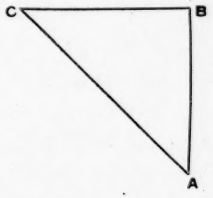
Now, according to the "water" theory of the Commission, either of said railroads may compete with the Hudson River; but neither of them can compete with the other.

According to the "market" theory of the Commission, each road, as against the river, may compete for traffic on its own side of the river; but neither of them can do anything to promote the traffic upon its own side of the river, in competition with the traffic upon the other side of the river.

Such refinements may be interesting, but they can not pro-

perly find a place in the construction of a statute intended for the practical administration of the most important commercial interests of the country.

The following diagram will serve to show at a glance the fallacy of the refinements attempted by the Commission:



Suppose the lines A C, C B, to represent a joint through rail line running from Augusta (A), via Cincinnati (C), to Baltimore (B); and suppose the line A B to represent the ocean and river route from Baltimore to Augusta. Under that hypothesis the Commission concedes that the joint through rail line may compete with the water route, without necessarily reducing the rates charged by the railroads between Cincinnati and Augusta.

The present rail and water rate of 89 cents per 100 pounds from Baltimore to Augusta could not be much exceeded by the joint through rail line, in face of the water competition afforded by the ocean and river route, A B.

Transcript, p. 135.

The Commission declined to disturb the present rate of $1.07 per 100 pounds from Cincinnati to Augusta, and therefore we assume that it was regarded as just and reasonable.

The railroads between Cincinnati and Augusta could, therefore, lawfully charge $1.07 from Cincinnati to Augusta, notwithstanding the joint through rail line might charge a joint through rate of only 89 cents from Baltimore to Augusta. The railroads between Cincinnati and Augusta would be charging more for a shorter distance, than the joint through rail line would be charging for a longer distance; but as it would be done to meet the

water competition afforded by the route A B, the Commission, in effect, concedes that it would be justified.

The citizens of Augusta would then, as now, have the choice of purchasing in the Baltimore market with a rate of 89 cents, or in the Cincinnati market with a rate of $1.07.

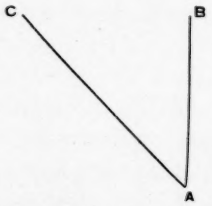
Augusta would have the benefit, as she does now, of the competition afforded by the rival markets of Cincinnati and Baltimore; and Cincinnati and Baltimore would enjoy the privilege of competing in the Augusta market, upon the same relative terms as they now enjoy.

The railroads between Augusta and Cincinnati (represented by the line A C) would compete for the business of Cincinnati, as against the business of Baltimore, precisely as the appellants in this case now do; and at precisely the same rates.

All of this could be done with perfect legality, according to all of the decisions heretofore made by the Commission.

The diagram is a substantially fair representation of what would be the situation in this case, if the Baltimore & Ohio R. R. (from Baltimore to Cincinnati), the C., N. O. & T. P. R'y (from Cincinnati to Chattanooga), the W. & A. R. R. (from Chattanooga to Atlanta), and the Georgia R. R. (from Atlanta to Augusta), should agree, as they might do, to form a joint through rail line from Baltimore to Augusta, with a joint through rate of 89 cents from Baltimore, as against a rate of $1.07 charged by the railroads between Cincinnati and Augusta.

Now let us change the diagram by simply omitting the line C. B., and it would appear as follows:



The withdrawal of the B. & O. R. R. from the joint through

Co. make any charge whatever for the transportation between Atlanta & Social Circle; and therefore they cannot be convicted of making a greater charge for the shorter distance.

The order of the Commission in this case requires *the defendants* "to cease and desist from making any greater charge, in the aggregate, on buggies, carriages, and other freight of the first class, carried in less than car loads, from Cincinnati to Social Circle, than *they* charge on such freight from Cincinnati to Augusta."

Now the appellants can say with absolute truthfulness, that "*they*" (i. e., *all* of them) do not *make any charge from Cincinnati to Social Circle.*

The C., N. O. & T. P. R'y Co. and the W. & A. R. R. Co. charge a joint through rate from Cincinnati to Atlanta; but the Georgia R. R. Co. does not participate in that rate, and does not receive one cent of it.

The Georgia R. R. Co. charges a separate local rate upon its own line, from Atlanta to Social Circle, but neither the C., N. O. & T. P. R'y Co. nor the W. & A. R. R. Co. participate in that rate; and neither of them receive one cent of it.

The appellants can also say with absolute truthfulness that "*they*" (i. e., *all* of them) do not *carry any freight from Cincinnati to Social Circle.*

The C., N. O. & T. P. R'y Co. and the W. & A. R. R. Co. have a joint through arrangement, under which *they* carry freight from Cincinnati to Atlanta; but the Georgia R. R. Co. is no party to *that* joint arrangement, and has nothing to do with the transportation of freight between Cincinnati and Atlanta, when destined to stop at Social Circle.

After freight, which is destined to stop at Social Circle, arrives at Atlanta, it is delivered to the Georgia R. R. Co., and neither the C., N. O. & T. P. R. R.Co. nor the W. & A. R. R. Co. have anything to do with the transportation of such freight from Atlanta to Social Circle.

XLVII.

The sixth section provides that every common carrier subject to the provisions of the Act, shall print and publish schedules of its rates, etc.; and "the schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad *between which property and passengers will be carried*, and shall contain the classification of freight in force upon such railroad," etc.

24 U. S. Stat. at Large, page 380.

It will be noticed that Congress leaves every common carrier at liberty to say between what points it will carry passengers and freight which shall be subject to the provisions of the Act; and it will be seen that the sixth section is, therefore, strongly confirmative of our contention that the Georgia R. R. Co. has the perfect right to refuse to form a joint through line, with a joint through rate, from Cincinnati to Social Circle, notwithstanding it has agreed to form such a line, with such a rate, from Cincinnati to Augusta.

XLVIII.

Counsel for the Commission may say that, according to our contention, every railroad company in the Union can protect its local rates from the operation of the fourth section, by simply refusing to agree to form joint through lines, with joint through rates, to or from its local stations; and that, in this way, the fourth section may be completely nullified.

Counsel overlook the fact, that the Act to regulate commerce does not undertake to compel any railroad company to subject its local rates to the operation of the fourth section.

There is nothing in the Act to compel any railroad company

to engage in interstate commerce; and still less is there anything in the Act to require a railroad company to engage in interstate commerce between all points, merely because it may have elected to engage in such commerce between certain designated points.

The Act to regulate commerce has left all railroad companies at liberty to follow their own interests in selecting the points between which they will make joint through lines, with joint through rates, and it is only with reference to the points so selected, that the 4th section was intended to apply.

The volume of local traffic on the Pennsylvania Railroad may be so large that the cost of moving it, per ton, per mile, may be low enough to make it to the interest of that company to agree to form joint through lines, with joint through rates, to, and from all of its local stations. Possibly it may be to the interest of all of the railroads in the populous and wealthy sections of the United States, to adopt the same policy; and with the wonderful growth and development of the country, the day may not be far distant when the policy can be adopted universally. But one error in the construction which the Commission places upon the Act to regulate commerce is, that it assumes that Congress intended to force, by arbitrary enactment, a result which must be disastrous, unless it comes in the due and orderly course of events.

XLIX.

The Joint Through Line from Cincinnati to Augusta, is Separate and Distinct from the Line of the Georgia Railroad.

The 4th section does not apply, except where the greater charge for a shorter than for a longer distance, is made "*over the same line.*"

The line formed under the joint tariff of two or more connecting railroad companies, is one separate and distinct from that of either of the connecting companies.

10 U. S. App. p. 436-437; *C. & N. W. R'y. Co.* vs. *Osborne.*

63 Fed. Rep. 905; *Parsons* vs. *C. & N. W. R. R.*

The material facts in the Osborne case were as follows:

The Chicago & Northwestern R. R. Co. owns and operates a railroad running from Missouri Valley, a town on the western border of Iowa, to Chicago, Ill. Scranton is a town in Iowa, on the line of that road, eighty-eight miles east of the town of Missouri Valley, and, therefore, so much nearer Chicago.

The Fremont, Elkhorn & Missouri Valley R. R. Co. owns a railroad running east and west through Nebraska, and connecting with the C. & N. W. Railroad at the town of Missouri Valley. Blair, Nebraska, is a point on the F. E. & M. V. R. R., thirteen miles west of the town of Missouri Valley.

While the F. E. & M. V. R. R. Co. is an independent corporation, a majority of its stock belongs to the C. & N. W. R. R. Co.; and its operations are controlled by the C. & N. W. R. R. Co.

During the month of January, 1888, there was in force on the C. & N. W. Railroad, a local tariff of rates, which was duly published in Scranton; and under which, the rate from Scranton to Chicago, on corn, was eighteen cents per 100 pounds. All shippers, shipping simply to Chicago, paid that rate.

At the same time, the through tariff rate on corn, shipped from Blair, Nebraska, through to New York City, was thirty-eight and one-half cents; to Boston, Philadelphia and Baltimore, said through tariff rates were slightly above and below the rate to New York.

Said through tariff rate was made up in this way: By agreement between the C. & N. W. R. R. Co. and certain Eastern companies, corn was shipped through to New York, from Turner and Rochelle (two small stations on the C. & N. W. R. R., one thirty, and the other seventy miles west of Chicago), for twenty-seven and one-half cents, three and one half cents of which went to the C. & N. W. R. R. Co., and the balance to the Eastern Companies; and by agreement between the C. & N. W. R. R. Co. and the F. E. & M. V. R. R. Co., the rate from Blair to Turner and Rochelle, on corn shipped through to New York, Boston, Philadelphia, or Baltimore, was eleven cents. By adding the eleven cents received by the C. & N. W. R. R. Co. from Blair to Turner and Rochelle, to the three and one-half cents received by that Company from Turner and Rochelle, to Chicago, a total rate of fourteen and one-half cents was made from Blair to Chicago, on corn shipped from Blair through to New York, and other Eastern cities; while the rate on corn shipped locally from Scranton to Chicago was eighteen cents.

In other words, by the agreements of the several Companies, a through rate was fixed on corn shipped from Blair to New York and other Eastern cities; and, of that through rate, the C. & N. W. R. R. Co. received for carrying over the whole line of its road, only fourteen and one-half cents; which was three and one-half cents less than the local rate (of eighteen cents) charged from Scranton to Chicago; though Scranton is 101 miles nearer Chicago, than Blair is.

10 U. S. App., 431 and 432.

The theory of the plaintiff in that case was that the C. & N.

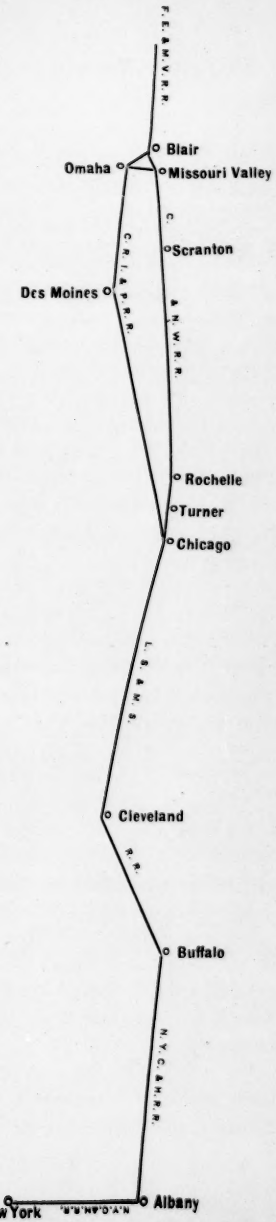
W. R. R. Co. had violated the long and short haul clause of the 4th section.

Page 433.

The Chicago, Rock Island & Pacific R. R. is, between Chicago and the Missouri River, a parallel and competing road with the C. & N. W. R. R.

Page 434.

The following diagram sufficiently illustrates the railway situation involved in the Osborne case.



DISTANCES.

	Miles.
Omaha to Chicago—	
Via C. & N. W.	492
Via C., R. I. & P.	503
Blair to Chicago	480
Missouri Valley to Chicago	467
Scranton to Chicago	379
Rochelle to Chicago	75
Turner to Chicago	30
Chicago to Cleveland	357
Cleveland to Buffalo	183
Buffalo to Albany	297
Albany to New York	143
Blair to New York	1460
Scranton to New York	1359
Rochelle to New York	1055
Turner to New York	1010
Chicago to New York	980
Cleveland to New York	623
Buffalo to New York	440
Albany to New York	143

Mr. Justice Brewer, in delivering the opinion of the Court, said:

"The Rock Island is, between Chicago and Missouri River, a parallel and competing road with the defendant company, and yet there is nothing in the Commerce Act, which compels either "company to charge for through or local transportation, the same as its competitor." . . .

. "Where two companies owning connecting lines of road *unite in a joint through tariff*, they form for the connected roads practically *a new and independent line*. Neither company is bound to adjust its own local tariff to suit the other, nor compellable to make a joint tariff with it. *It may insist upon charging its local rates for all transportation over its line.* If, therefore, the two companies, *by agreement, make a joint tariff over their lines, or over any parts of their lines, such joint tariff is not the basis by which the reasonableness of the local tariff of either line is determined.*" (P. 434.)

"To illustrate: On the Defendant's road, the distance from Turner to Chicago is thirty miles; on the Lake Shore Line, from Chicago to Cleveland, it is two or three hundred miles. The defendant company may charge fifteen cents for transporting grain the thirty miles from Turner to Chicago, providing that be, in fact, only a reasonable charge for the service, although the Lake Shore Company charges no more for transporting it from Chicago to Cleveland, *and this fact that the rate on each line is fifteen cents for the distance named will not prevent the two companies from making a joint tariff for grain shipped from Turner to Cleveland of twelve cents; less than the local tariff of either.*" (Pp. 434, 435.)

"That we may not be misunderstood, we do not mean to intimate that the two companies, *with a joint line*, can make a tariff from Turner to Cleveland higher than from Turner to Buffalo, or any other intermediate point between Cleveland and Buffalo; for when the two companies *by their joint tariff make a new and independent line*, that new and independent line *may* become subject to the Long and Short Haul Clause. But what we mean to decide is, that a *through tariff* on a *joint line* is not the standard by which the separate tariff of either company is to be measured, or condemned." (P. 435.)

. . . "The denunciation of the Fourth Section is against each separate common carrier for its violation of the Long and Short Haul Clause on its own line." (P. 436.)

L.

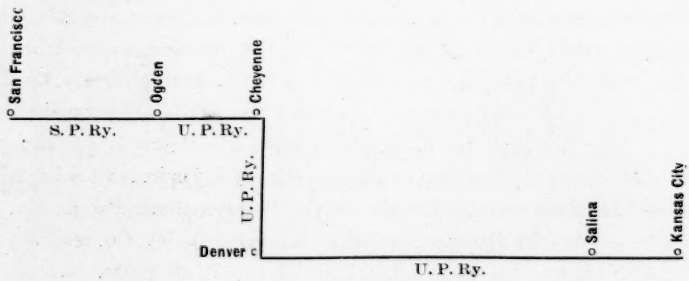
In the case of United States vs. Mellen, 53 Fed. Rep., 230, it appeared that the Southern Pacific Ry. Co., owning a road from San Francisco to Ogden, 895 miles, and the Union Pacific Ry. Co., owning a road from Ogden to Kansas City, 1,261 miles, "united in a joint through tariff," under which, the "new line," thus formed, charged 65 cents per 100 pounds on sugar in car load lots from San Francisco to Kansas City. The Southern Pacific Ry. Co. received 32 6-10 cents, and the Union Pacific Ry. Co. received 32 4-10 cents of the total joint through rate of 65 cents.

Salina is a station upon the main line of the Union Pacific Ry., 186 miles west of Kansas City; and is a shorter distance from San Francisco, by 186 miles, than Kansas City is.

The rate on sugar, in car load lots, from San Francisco to Salina, was 94 cents, which was arrived at by taking 32 6-10 cents (the proportion of the Southern Pacific Railway of the joint through rate from San Francisco to Kansas City), and adding thereto 61 4-10 cents, which was the local rate of the Union Pacific R'y from Ogden to Salina.

The result was, that Salina, though 186 miles nearer than Kansas City to San Francisco, was charged 29 cents per 100 pounds more than Kansas City, on sugar from San Francisco; and, that while the Union Pacific Ry., on sugar from San Francisco to Kansas City, received only 32 4-10 cents per 100 pounds, it charged Salina 61 4-10 cents per 100 pounds for tranporting the same kind of sugar, over the same road, in the same direction; though the distance to Salina was 186 miles less than to Kansas City.

The following diagram sufficiently illustratrates the railways and cities involved in the Mellen case:



Judge Riner held that the Fourth Section applies to each separate common carrier, for its violation of the Long and Short Haul Clause on its own line. He held that the fact that the two companies united in a joint through tariff from San Francisco to Kansas City, constituted "*a new line*," and that the rates charged by the "new line" would not furnish a basis upon which either of said companies would be bound to adjust its own local tariff. (*See* pp. 231, 232.)

The Mellen case presents an illustration of the competition of markets. Though the fact does not appear in the Report, it is true, that Hawaiian sugar, refined in San Francisco, moving eastward, meets Cuban sugar, refined in New York, moving westward. Both kinds of sugar compete in the Mississippi and Missouri Valleys, for sale in those markets of consumption; and it was found that 65 cents per 100 pounds was the highest rate that the San Francisco railroads could obtain to Kansas City, if the Hawaiian sugar was to be sold there, on such terms, as would afford the owners a reasonable profit, and enable that sugar to compete there, with the Cuban sugar from New York.

Transcript, pages 116, 124.

LI.

Counsel for the Commission in the Court of Appeals, cited the case of *I. C. C.* vs. *The Detroit, Grand Haven & Milwaukee R'y. Co.*, 57 Fed. Rep., 1005.

The D., G. H. & M. Ry. Co. owns a railroad running from Grand Haven to Detroit. Grand Rapids is 31 miles east of Grand Haven; Ionia is 34 miles east of Grand Rapids; and Detroit is 124 miles east of Ionia.

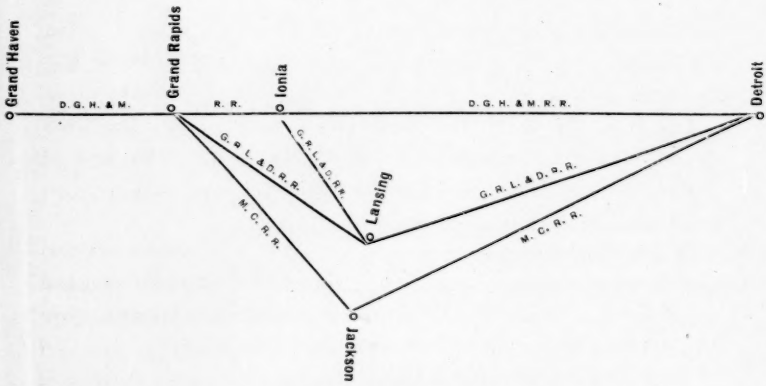
In accordance with a practice approved by the Interstate Commerce Commission, Ionia and Grand Rapids are grouped together, and have the same freight rates from Boston, New York, Philadelphia, etc.

At Grand Rapids, said railway company, at a cost to itself of two cents per hundred weight, provides free cartage between its station there, and the places of business of its patrons; but at Ionia, it does not provide free cartage.

At Grand Rapids, said railway company is in competition with the Michigan Central Railroad, and the Grand Rapids, Lansing & Detroit Railroad; and the stations of the two last mentioned railroads, at Grand Rapids, are nearer to the business center of said city, than is the station of the D., G H. & M. Ry.

Judge Taft held that furnishing free cartage was equivalent to the railway company's reducing the freight by as much as the cartage would cost the consignee; and, as the reduction was made at Grand Rapids, but not at Ionia, the railway, in effect, charged Ionia a greater compensation for a shorter haul, than it charged Grand Rapids for a longer haul, over the same line, and in the same direction.

The following diagram sufficiently illustrates the railways and cities involved in the case of *I. C. C.* vs. *D., G. H. & M. Ry. Co.*



It was contended by the railway company, in that case, that the Long and Short Haul Clause did not apply, because the transportation to Ionia, and that to Grand Rapids, are not under substantially similar circumstances and conditions; but Judge Taft held, *that as the railway company had grouped Ionia and Grand Rapids together, and charged them the same rates from the East*, it was "*a conclusive admission* by the defendant, that so far as the transportation from the East to the warehouses (stations) of the company at the two places, is concerned, it is under substantially similar circumstances and conditions." (P. 1010.)

As the defendant in that case had "*conclusively admitted*," by grouping them together, that transportation from the East to its station at Ionia, was conducted under substantially similar circumstances and conditions as transportation from the East to its station at Grand Rapids, the defendant was in no position to make the point that the difference between the competition prevailing at Grand Rapids, and the competition prevailing at Ionia, if any, constituted a substantial dissimilarity of circumstances or conditions. And, as the defendant was in no position to make

the point, the Court was in no position to decide it; and it was not in fact decided by the Court.

The defendant in that case had elected to group Ionia and Grand Rapids together, and to treat them *as though they were but one city, or locality.*

We have hereinbefore conceded that a carrier cannot legally discriminate in favor of one shipper, against another shipper, shipping the same class of freight, from the same point of departure, to the same point of arrival; and as Ionia and Grand Rapids were grouped together, they were considered as but one point.

LII.

The Commission Has No Authority to Prescribe Maximum Rates.

The Commission ordered the defendants to "cease and desist from making any charge for the transportation of such freight (i. e., buggies, carriages and other freight of the first class) from Cincinnati to Atlanta in excess of $1.00 per hundred pounds."

Transcript, p. 21.

There is no provision in the Act to regulate commerce which authorizes the Commission to fix or prescribe rates of any kind.

The law of the State of Georgia authorizes the Railroad Commissioners of that State "to make for each of the railroad corporations" doing business in that State, "a schedule of just and reasonable rates of charges for the transportation of passengers and freights and cars on each of said railroads."

Transcript, p. 263.

Similar statutes authorizing Railroad Commissions to make schedules of rates of charges for railroad transportation have been passed by several other States of the Union, but no such power was conferred upon the Interstate Commerce Commission by the Act to regulate commerce.

In the case of the *K. & I. Bridge Co.* vs. *L. & N. R. R. Co.* Judge Jackson said that the Act "does not undertake to prescribe anything more upon the subject of rates than that they shall be reasonable and just."

47 Fed. Rep., 634, *K. & I. Bridge Co.* vs. *L. & N. R. R. Co.*

In one of the earliest cases decided by the Commission, in answer to an application to compel a certain reduction in rates, it was said by Judge Schoonmaker: "It is therefore impossible to fix them in this case, even if the Commission had power to make rates generally, *which it has not.* Its power in respect to rates is to determine *whether those which the roads impose are for any reason in conflict with the statute.*"

1 I. C. C. Rep., pp. 155, 156, *Thatcher* vs. *D. & H. C. Co. et al.*

The power of the Commission, even as stated by Judge Schoonmaker, is greater than the Act really confers upon the Commission.

The Commission "is neither a Federal Court under the Constitution, nor does it exercise judicial power, nor do its conclusions possess the efficacy of judicial proceedings." . . . "The functions of the Commission are those of referees or Special Commissioners, appointed to make preliminary investigation of and report upon matters for subsequent judicial examination and determination. In respect to Interstate Commerce matters covered by the law, the Commission may be regarded as the general Referee of each and every Circuit Court of the United States, upon which the jurisdiction is conferred of enforcing the rights, duties, and obligations recognized and imposed by the Act."

37 Fed. Rep., p. 613, *K. & I. Bridge Co.* vs. *L. & N. R. R. Co.*

"The findings of *fact*," as made by the Commission in refer-

ence to the reasonableness of a rate, are made *prima facie* evidence by the Act; but the opinions of the Commission upon the questions of *law*, relating to the resonableness of a rate, are not given any potency whatever by the Act. Upon the trial of the question, in the Circuit Court, as to the reasonableness of a rate, the case is heard "*de novo*, upon pleadings and proofs, the latter including not only the *prima facie* facts reported by the Commission, but all such other and further testimony as either party may introduce, bearing upon the matters of controversy." The "judgment," or "determination," as to whether a particular rate is reasonable, is to be rendered, not by the Commission, but by the Court.

37 Fed. Rep., 614, *K. & I. Bridge Co.* vs. *L. & N. R. R. Co.*

43 Fed. Rep., 43, *I. C. C.* vs. *B. & O. R. R. Co.*

49 Fed. Rep., 177, *I. C. C.* vs. *L. V. R. R. Co.*

50 Fed. Rep., 295, *I. C. C.* vs. *A., T. & S. F. R. R. Co.*

56 Fed. Rep., 926, *I. C. C.* vs. *C., N. O. & T. P. R. R. Co.*

62 Fed. Rep., 693, *Shinkle, Wilson & Kreis Co.* vs. *L. & N. R. R. Co.*

I. C. C. vs. *C., N. O. & T. P. R'y Co. and S. M. Felton, Receiver*, U. S. Circuit Court, Southern District of Ohio. (Not yet reported.)

We submit, therefore, that Judge Schoonmaker stated the power of the Commission too broadly when he said that the Commission has the right "to *determine*" whether a particular rate is reasonable or not; but we think he stated the power of the Commission correctly when he restricted it to rates "*which the roads impose.*"

In this case, the only first class rate "which the roads impose" from Cincinnati to Atlanta, is $1.07 per hundred pounds. The Commission had the power to ascertain all the facts relating to

the question as to whether that rate is reasonable or not; and the facts thus found by the Commission would be *prima facie* evidence when the question came before the Circuit Court for *its* "judgment" or "determination." The Commission might with propriety add to its findings of fact, an expression of its opinion as to whether, upon those facts, the rate is reasonable or not. As, however, such an opinion would necessarily involve matter of law; it would not be entitled, like the findings of fact, to *prima facie* weight in the Circuit Court. The Commission was not content in this case, with expressing the opinion that the rate of $1.07 (the only rate "which the roads impose") is unreasonable, but it went further, and expressed the opinion that any rate "in excess of $1.00 per hundred pounds" is also unreasonable. In fact, it went still further, and *enjoined* the railroad companies from making any charge in excess of $1.00 per hundred pounds.

If a contract for the loan of money be made in a State where 6 per cent. is the legal rate of interest, and the contract stipulates for 10 per cent. interest, a *Court* would declare the contract void, or voidable, for usury, either as to the excess over legal interest, or as to the whole amount of the contract, dependent upon the law of the particular State.

The Court would, however, restrict its judgment to the case before it, and would adjudicate no more than that the contract which stipulated for ten per cent. interest was illegal. The Court might express the opinion that any contract stipulating for interest in excess of six per cent. would also be illegal; but the Court would not assume to enjoin the parties from entering into any future contract stipulating for interest in excess of six per cent. It would leave the parties at liberty to make such contracts as they saw proper; they taking the risk of having such contracts declared illegal, if they should stipulate for interest in excess of six per cent.

The line of reasoning under which the Commission has con-

vinced itself that it is the repository of authority to name future railroad rates, is thus stated by Commissioner Morrison in the case of *Coxe Bros. & Co.* vs. *L. V. R. R. Co.* (4 I. C. R. R., 577, 578), a case in which it curiously appeared that the petitioners did not desire the naming of any maximum rate, while counsel for the defendant took the opposite ground. The Commission uses the following language: "If, impressed with the belief that the existing rates were not exorbitant, a carrier should attempt compliance with the Commissioners' conclusion that they were excessive, by making the least possible reductions, repeated and continual applications would be necessary to correct a single abuse. Certainly Congress intended no such absurdity as this, but, as insisted upon by counsel for the road, when we have been convinced that rates are unjust, it will be our duty to say what they ought to be, or at least to determine upon some rate, any charge in excess of which would be unreasonable. If the duty of the Commission in respect to unjust and unlawful rates ends when it has been convinced that rates are unreasonable, and so decides them to be, and for any reason the Commission may not determine what are, as well as what are not reasonable, the regulation provided by the statute begins with complaint and ends in confusion."

It will be seen that the foregoing is simply an argument *ab inconvenienti*. It concedes that the desired power has not been expressly conferred, but since it is thought that the powers claimed to have been granted cannot be usefully exercised, without the further authority to prescribe future rates, this power also must be assumed to have been intended.

Such a claim, in respect to a statute which creates a new administrative jurisdiction, contains its own answer. If the power be not directly granted, it cannot be inferred. If it be essential to the useful operation of the statute, an amendment or addition to the law is the only way in which it can be obtained.

LIII.

The Facts Found by the Commission were Insufficient to Predicate an Opinion as to the Reasonableness of the Rate.

What is a reasonable rate, "is often a complex question, into which enters many elements and considerations."

100 N. Y. 402; *Kellmer* vs. *N. Y. C. & H. R. R. R. Co.*

"No more difficult problem can be presented than this. There are so many matters which enter into it, and which must be taken into consideration, before a satisfactory answer can be reached."

Ames et al. vs. *U. P. R'y Co.* Pamphlet Opinions, p. 15, per Mr. Justice Brewer.

Among other elements to be considered are,

First: That a railroad company is entitled to receive at least some compensation for the use of its property; if it be possible without prejudice to the rights of others.

154 U. S., p. 412; *Reagan* vs. *Farmers' Loan & Trust Co.*

Oliver Ames et al. vs. *U. P. R'y Co. et al.* Pamphlet Opinions, p. 22.

There was no evidence before the Commission as to the amount of tonnage of first-class freight carried by the appellants, the C., N. O. & T. P. R'y Co. and the W. & A. R. R. Co. between Cincinnati and Atlanta annually; and therefore the Commission had no way of ascertaining what loss of revenue would be occasioned to those companies, by ordering a reduction of seven cents upon every hundred pounds of that class of freight, carried by those companies, between those cities.

Second: The "*value of the service*" to the shipper is also an element to be considered in fixing a reasonable rate. It is a well-known fact that "first class" freight includes those articles whose

value is very great in proportion to bulk or weight, and therefore the transportation charge, though comparatively high, as compared with the rates charged upon the lower classes of freight, represents in reality but an infinitessimal proportion of the value of the article transported. The shipper of first-class freight can afford to pay much higher comparative rates than shippers of the lower classes of freight, because the profits upon first class freight are much greater. In other words, the value of the carrier's service to the shipper is much greater in the case of first class freight, than in the case of any of the lower classes.

I. C. C. vs. *D., L. & W. R. R. Co.*, Pamphlet Opinions, page 1.

The Commission had no evidence before it as to the value of the service, and did not take that element into consideration, at all.

Third: The Commission based its action in reducing the rate from Cincinnati to Atlanta, chiefly, if not entirely, upon the fact that the first class rate from Cincinnati to Birmingham is 89 cents, as compared with $1.07 to Atlanta, "the distances being substantially the same."

Transcript, page 17.

The Commission made no inquiry as to why the rate from Cincinnati to Birmingham was lower than the rate from Cincinnati to Atlanta. If such inquiry had been made, it would have developed the fact that prior to the construction of the Kansas City, Memphis & Birmingham R. R. between Memphis and Birmingham, the rate on first class freight from Cincinnati to Birmingham was one cent higher than from Cincinnati to Atlanta; and that it was the competition inaugurated by that new railroad which reduced the rates from Cincinnati to Birmingham, from the former rate to the present rate of 89 cents per hundred pounds.

Transcript, pp. 173–230.

In other words, the competitive situation at Birmingham is substantially dissimilar from that at Atlanta. Birmingham is a city in the interior of Alabama; and it is not reached by either of the Appellants, the W. & A. R. R., or the Georgia R. R. Neither of those roads can control the rates to and from Birmingham, and therefore cannot be held responsible for such rates as may prevail there.

Mr. Justice Brewer said, in the case of *Oliver Ames et al.* vs. *U. P. Ry. Co. et al.*, Pamphlet Opinions, p. 37, that comparisons "between the rates of two States are of little value unless all of the elements that enter into the problem are presented." The Commission regarded no element except that the "distances" from Cincinnati to Birmingham and Atlanta were substantially the same. The Commission is, unfortunately, possessed of the idea that the transportation rates of this country can, and ought, to be adjusted upon a mileage basis, and that a tape line, or a yard stick, is the only thing necessary to settle all the questions involved in the railroad problem.

LIV.

The Southern Railway and Steamship Association.

Counsel for the Commission, in the Court of Appeals, were quite severe in their denunciation of an organization, known as the Southern Railway and Steamship Association, of which the appellants are members.

The denunciation was predicated upon the idea that said Association is an illegal combination, organized for the purpose of stifling competition.

Said Association acts under written articles, which are made to expire with the end of the year, and are renewed from time to time, each year, upon expiration. In some instances, some of the roads or steamship lines decline to renew the agreement; and other roads or steamship lines apply for membership. The agree-

ment in controversy took effect January 14, 1892, and expired July 31, 1892.

Transcript, p. 213.

There are at present twenty-six railroad companies, and steamship companies, members of the Association; and they operate in the territory south of the Potomac and Ohio Rivers, and east of the Mississippi River. There are, however, quite a a number of railroad companies, and steamship companies, operating in that territory, which do not belong to said Association.

Transcript, p. 204.

A glance at the map, filed as exhibit No. 4, to McGovern's deposition, will show that the territory of said Association is nearly completely surrounded by the Atlantic Ocean, the Gulf of Mexico, and the Mississippi, Ohio and Potomac Rivers; while various other navigable rivers penetrate it for great distances, from almost every direction.

Transcript, p. 194. (Inset No. 4.)

Map No. 3, filed as part hereof, shows the territory in which said Association operates; the lines which are members; and the lines which are not members. It also shows the navigable rivers which penetrate the territory.

The objects of the Association are as follows:

First: "The establishment and maintenance of tariffs of uniform rates, to prevent unjust discrimination, such as necessarily arises from the irregular and fluctuating rates which inevitably attend the separate and independent action of transportation lines."

Second: "To conduct the business in which they have a common interest, so as to secure a proper correlation of rates, such as will protect the interests of competing markets, without unjust discrimination in favor of, or against any city, or section."

Third: "To provide means for the prompt adjustment of differences which may arise between them, by placing the conduct of all the traffic common to two or more companies, under well

defined rules and regulations, which will insure the maintenance of rates."

Transcript, pp. 245–6.

The traffic which is declared to be subject to the Association agreement, is: All business "*for which two or more of the parties (members of the Association) compete*, having origin or destination" within certain described territory; *but traffic to or from a local point on any line shall be considered local to that line*, and, so far as that line may be concerned, *shall not be subject to the agreement.*

Transcript, p. 245.

We submit with confidence that the objects of the Association are not only lawful, but laudable; and that they are in furtherance of the purposes of the Act to regulate commerce.

The Circuit Court of Appeals for the Eighth Circuit said of a similar contract under which the Trans-Missouri Freight Association was organized, that "it appears to be a contract tending to make competition fair and open, and to induce steadiness of rates, and is in accord with the policy of the Interstate Commerce Act." (58 Fed. Rep., 59, *U. S.* vs. *Trans-Missouri Freight Association*, approving the decision in 53 Fed. Rep., 440, in the same case at Circuit.)

Speaking of such associations, the Interstate Commerce Commission, in its first annual report, said: "But what perhaps, more than anything else, influenced the formation of such associations, and the conferring upon them of large authority, was the liability, which was constantly imminent, that destructive wars of rates would spring up between competing roads, to the serious injury of the parties, *and the general disturbance of business.*

Accordingly, one of the chief functions of such associations has been the fixing of rates, and the devising means whereby their several members can be compelled or induced to observe the rates when fixed."

(1 An. Rep. I. C. C., pp. 33, 34.)

The practical operation of the Association in the Southern territory for a period of twenty years proves conclusively that it has

not had the effect to stifle competition in that territory; and, upon that point, we can call no better witness than the Interstate Commerce Commission, itself.

In its first annual report, the Commission, in speaking of the territory covered by the Southern Railway & Steamship Association, said: "The railroad business of that section has grown to be what it is, *in sharp competition* with water carriers, who not only have had the ocean at their service, but by means of navigable streams were able to penetrate the interior in all directions.

(1 I. C. C. Rep., p. 280.)

And in its fourth annual report, November, 1890, in speaking of the difficulties of adopting a uniform classification, the Commission said: "This would be particularly the case in the territory of the Southern Railroad & Steamship Association, where the interests are more diverse than elsewhere, *the railroads being in sharp competition, not merely with each other, but also with steamship lines at important points.*"

(4 I. C. C. Rep., p. 368.)

We have shown in Section XIX. that while the sum of the separate through rates from Cincinnati to Chattanooga, and from Chattanooga to Atlanta, would make a total rate of $1.32 per hundred pounds from Cincinnati to Atlanta; the competition in that territory is such that the railroads between Cincinnati and Atlanta are forced to accept a joint through rate of only $1.07 per hundred pounds.

We have shown in Section III. that while the sum of the separate through rates from Cincinnati to Chattanooga; from Chattanooga to Atlanta; and from Atlanta to Augusta; would make a total rate of $1.97 per hundred pounds, the competition in that territory is such that the railroads between Cincinnati and Augusta are forced to adopt a joint through rate of only $1.07 per hundred pounds.

We submit that facts such as those outweigh any amount of denunciation and abuse.

Respectfully submitted,

Ed. Baxter.

Office Supreme Court, U. S.
FILED.
JAN 7 1895
JAMES H. McKENNEY,

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

Nos. 729 and 832.

THE CINCINNATI, TEXAS & PACIFIC R'Y CO., THE WESTERN & ATLANTIC R. R. CO., and THE GEORGIA RAILROAD CO., Appellants,

against

THE INTERSTATE COMMERCE COMMISSION, APPELLEE.

APPEAL AND CROSS-APPEAL.

LONG AND SHORT HAUL CASE.

Argument for Interstate Commerce Commission.

N. J. HAMMOND,
GEORGE F. EDMUNDS,
For Interstate Commerce Commission.

Franklin Printing and Publishing Company, Atlanta.

Supreme Court of the United States.

Nos. 729 and 832, October Term, 1894.

The Cincinnati, N. Orleans & Texas Pacific R'y Co.,
The Western & Atlantic Railroad Co., and
The Georgia Railroad Co., Appellants,

against

The Interstate Commerce Commission.

Appeal from the United States Court of Appeals for the Fifth Judicial Circuit.

And Cross-Appeal by the Interstate Commerce Commission.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

(THE PAGES ARE THOSE OF ORIGINAL RECORD.)

The Interstate Commerce Commission, in June, 1891, acted upon the petition of the James & Mayer Buggy Company against said railroad companies not to charge thereafter more freight on carriages, buggies and other articles of that class to Social Circle, Georgia, than to Augusta, Georgia, a greater distance on the same alleged through line, and not to charge more than a dollar per hundred pounds on such freight. The companies refused to obey the order, and the Commission filed in the Circuit Court of the U. S. for the Northern District of Georgia a bill to compel obedience to said orders.

Chronologically the facts are stated in the findings and report of the Interstate Commerce Commission through Mr. Morrison, Commissioner. (Rec., pp. 29–31.)

Following the statement of facts presented to the Commission, its decision appears in the record (pp. 30–34), and the order of the Commission is on page 36 of the record.

Certain answers were filed before the action of the Commission.

The answer of the Western and Atlantic Company before the Commission was in substance that Social Circle was a local point on the Georgia Railroad, and that that company had not furnished any basis for business other than taking the rate from Cincinnati to Atlanta and adding the local, and that the rates to Augusta were brought down by *water* competition.

The answer of the Georgia Railroad Company there admitted that it was acting under a common arrangement with the other carriers for transportation between Cincinnati and Chattanooga and between Chattanooga and Atlanta and Augusta; that the rate from Cincinnati to Atlanta, 473 miles, was $1.01 per 100 pounds, though the proper rate should have been $1.07; that the rate from Cincinnati to Augusta "*over the same line of railroad and the railroad of this respondent*," 645 miles, was $1.07; that it had no arrangement with the roads between Atlanta and Cincinnati for through rates to Social Circle, etc.; that the rates made from Cincinnati to Social Circle were the rate to Atlanta plus the rate from Atlanta to Social Circle, which amounted to $1.37 to that place; that the rate from Atlanta to Social Circle was reasonable, and that from Cincinnati to Social Circle was reasonable; that the through rate from Cincinnati to Augusta was not under substantially similar circumstances and conditions, because at Baltimore and other Eastern cities large manufactories of buggies, etc., existed, and their products were transported from those places to Augusta at such rates that if this respondent and its connections were to charge a rate higher, no freight would come over their line; that it was true shipments from Cincinnati to Social

Circle were made on a through bill of lading, and the rates were made up as before stated. (Rec., pp. 18–20.)

The answer of the Cincinnati, New Orleans and Texas Pacific Company there admitted the status of the complainants before the Commission and denied that the business was carried on under a *common control, arrangement*, etc.; it admitted the rate from Cincinnati to Atlanta to be as before stated, and the rate to Augusta to be as before stated, and that the rate to Social Circle "*over the same line*" (525 miles) was $1.31 per hundred; that its percentage proportion of the rate to Atlanta was 71.6, that of the Western and Atlantic Company was 29.4; that its proportion of the rate to Augusta was 52.6, and that of the Western and Atlantic was 21.6, and of the Georgia Railroad Company 26.8; that the rate to Atlanta was reasonable; that the rate to Augusta was the same as to Atlanta, because the rate was governed by the rate from *Baltimore* and *New York* to Augusta on account of *water* competition *via* Charleston and Savannah. As to Social Circle, it said that that rate could only be made by consent of the Georgia Railroad Company, and could only be affected by the co-operation of that company, Social Circle being a station "on its line," and the Georgia Railroad Company insisting that the rate should be 30 cents greater than the rate to Augusta and Atlanta.

THE RAILROAD COMPANIES' ANSWERS IN THE CIRCUIT COURT.

In the circuit court the respondents put in answers and contentions as follows: The Louisville and Nashville Railroad Company and the Central Railroad and Banking Company, as successors of the Georgia Railroad Company and the Western and Atlantic Railroad Company, answered that they were engaged in the business between Cincinnati, Atlanta, Social Circle, and Augusta, and that they had an arrangement or agreement for the continuous carriage of

through freight from Cincinnati to Augusta, but were under no common control or management. (Rec., pp. 45, 46.) They admit that the order of the Commission was made as stated, and that they have continued to disobey it; but say that *after* the order was made, a general freight agent issued a request that in issuing bills of lading to "local stations" on the Georgia Railroad "*no rates*" (still allowing through bills of lading) be inserted east of Atlanta, with certain exceptions, which exceptions did not include Social Circle; that they have continued, however, to receive and transport buggies *and other merchandise* consigned to Social Circle, etc., in the course of which the Cincinnati, New Orleans and Texas Pacific Company issued through bills of lading with a stipulation as to rates. (Rec., pp. 48, 49.) That the rate from Cincinnati to Atlanta is made by agreement between the companies, and that the Georgia Railroad Company is not consulted in making it.

They aver that the through rate from Cincinnati to Atlanta is fixed by active competition and is reasonably low, and that the local rate from Atlanta to Social Circle is fixed by the Georgia Railroad Company and is reasonably low, but admit that the shipment is continuous from Cincinnati to Social Circle, and the guaranteed rate the same; that the rate from Cincinnati to Augusta is made by agreement between the lines carrying the same and that it is forced upon them by other lines of competition from Cincinnati and by still others from Baltimore, etc.; that Baltimore has large manufactories of buggies, etc., which are carried from there at such rates that if the respondents were to charge more than $1.07 from Cincinnati to Augusta they could not get the business and Cincinnati would be driven out of the Augusta market, and it sets up in general the competition of Baltimore and other Eastern cities for the Augusta market. (Rec., pp. 46, 50.)

They admit that the freight from Cincinnati to Augusta is carried over the "*same lines*" (Rec., p. 50)

and in the same direction as freight from Cincinnati to Social Circle, but insist that the conditions are not the same, because no rival line can reach Social Circle while at Augusta competition exists, and insist that this makes a defense. (Rec., p. 51.) They admit that the Georgia Railroad Company receives 28.4 cents per 100 pounds from Atlanta to Augusta and that they can do the business at a "slight profit;" that they can not get connections on any other basis and do justice to themselves, "considering the relative mileage." (Rec., pp. 51, 52.) They claim that the through rate can not be increased on account of *water* competition at Augusta, and that reducing their rates to intermediate places would reduce their annual revenue $50 000, while they get from the through business $123,000, etc. (Rec., p. 52.)

The answer of the Cincinnati, New Orleans and Texas Pacific Company admits the general and undisputed facts found by the Commission, that the freight is carried through from Cincinnati to all these points without break of bulk, but say that it is not done under any "*common control or management.*" It does not deny a common *arrangement* for continuous transportation and through bills of lading. It insists that the findings of the Commission were not justified by the evidence, etc. (Rec., p. 55.) It admits the rates and collections as previously stated and that the rates are made by agreement to Atlanta and Augusta according to "the proportion which the *mileage* of each bears to the whole distance," but that the Georgia Railroad Company gets its local rates to places between Atlanta and Augusta; it insists that the rates are reasonable and that *it* has made no rate to Social Circle; that the separate state rate for purely state commerce from Atlanta to Augusta is 64 cents per 100 pounds (Rec., p. 51); but that the Georgia Railroad Company gets its proportion from Cincinnati to Augusta on a mileage basis amounting to 28.4 cents, as before stated. (Rec., p. 51.)

The Commission had found that there was no such

competition, etc., as to justify the discrimination. After the petition was filed in the Circuit Court some new answers were filed, and some modifications were made in those that had been filed theretofore, as shown above. Some slight questions arose in the case as to parties in the original record, but they all were adjusted by consent later, so that there is nothing in the case here now but the construction of the United States statute and the application of it to the particular facts in this controversy.

THE EVIDENCE AS TO THE ALLEGED COMMON CONTROL AND MANAGEMENT.

There is in the record a contract in full between these railroad companies and many others, perhaps all in the territory. Parts of it most pertinent seems to be the following:

"THE SOUTHERN RAILWAY AND STEAMSHIP ASSOCIATION AGREEMENT."

"This agreement, made this 14th day of January, A. D. 1892, by the parties whose signatures are hereto attached, witnesseth that

"WHEREAS, The establishment and maintenance of tariffs of uniform rates, to prevent unjust discrimination such as necessarily arises from the irregular and fluctuating rates which inevitably attend the separate and independent action of transportation *lines* is important for the protection of the public; and

"WHEREAS, It is deemed to be to the mutual advantage of the public and the transportation companies, that business in which they have a common interest should be so conducted as to secure a proper correlation of rates, such as will protect the interests of competing markets without unjust discrimination in favor of or against any city or section; and

"WHEREAS, These objects can be obtained through the co-operation on the part of the various transportation *lines* engaged in the traffic of the territory south of the Potomac and Ohio Rivers, and east of the Mississippi River; and

"WHEREAS, Such co-operation is absolutely neces sary to a strict compliance with the requirements of the Act of Congress, entitled 'An Act to Regulate Commerce';

"*Now, therefore*, In order to secure such co-operation among the said transportation *lines* and provide means for the prompt adjustment of the differences which may arise between them, by placing the conduct of all the *traffic common* to two or more companies under well defined rules and regulations, which will insure the maintenance of rates, it is mutually agreed as follows;"

The first article gives the name of the association, as above. Then followed directions as to the organization and officers of the company. It declared that each contracting company, or if two or more of them, form "*a line*," *each line* shall be represented on the Executive Board, which shall fix rates of freight for each member of the association.

Article eight said, "The Rate Committee shall have sole authority to make all rates and classifications on all traffic covered by this agreement, subject to the decision of the Commissioner" (that is Mr. Stahlman), "the Executive Board or Board of Arbitration, as hereinafter provided, in case such Rate Committees cannot agree; but if the Rate Committees shall fail or omit to make rates on any traffic covered by this agreement, the Commissioner shall have authority to make such rates, it being the intention that there shall be properly authenticated tariffs of rates on all such *traffic*."

Article thirteen said, "When directed by the Executive Board, the Commissioner shall also take charge of reports and claims, and appoint such clerks and claim agents as may be necessary, and charge up the expense to the roads interested in the business, on an equitable basis, managing the business for the benefit and at the cost of the companies interested. He shall also have authority to reduce the rates when necessary to meet the competition of

lines or roads not parties to this agreement, and he may at the same time make corresponding reduction from other points from which relative rates are made. He shall have such authority over the traffic officers and their subordinates and over the accounting departments of the parties hereto as may be necessary to enforce the terms of this contract relative to the maintenance of rates, and to require information relating to the *traffic* to be furnished to him in such form or manner as he may deem necessary."

Again, on page 350 of the record, article nineteenth shows the character of this agreement:

"Section 1. That all rail rates to and from the ports of Boston, Providence, New York, Philadelphia and Baltimore to points within the territory as covered by this agreement, shall be higher than the rates by water or *combined water and rail lines* by the present differentials, as established by the Board of Arbitration, July 19th, 1889, and subject to the Southern Railway and Steamship Association classifications.

"Section 2. *Water lines or combined water and rail lines* may insure against marine risks by issuing insured bills of lading between the above named ports and points within the territory covered by this agreement, provided they give two weeks' written notice to the Commissioner, naming the points to which they will issue insured bills of lading."

The third section refers to the cost of insurance against marine risks.

The fourth section states that the all rail differentials shall not be changed except by arbitration.

Article 22d, at page 352 of the record, is as follows:

"All measures necessary to carry out the purpose of this agreement shall be taken jointly by the parties hereto; and should any question arise upon which they cannot agree in relation to the terms of this contract or any matter arising thereunder, it shall be

decided by arbitration as herein provided, it being one of the fundamental principles of this contract that no party shall take separate action in any matter affecting the interest of one or more of the other parties contrary to the spirit and intent of this contract, and that all differences relating to the establishment, adjustment and maintenance of rates upon the *traffic* covered by this contract shall be adjusted by arbitration."

Article twenty-third, section 2, at page 353 of the record, is as follows:

"It is distinctly understood and agreed that the maintenance of rates as established under the rules of the Association is of the very essence of this agreement, and the parties hereto pledge themselves to require all their connections to maintain such rates, and in the event of any company *or line*, or its connections not members of the Association failing to conform to this obligation, the other parties in interest pledge themselves to increase their proportions of *through rates* sufficiently to protect the authorized rate whenever required by the commissioner to do so, provided that in no case shall any company be *required to charge more than its published local rates.*"

As to how the commission controlled these railroads and their associates see Record, pp. 180-184, 200, 221, 269*, 281, 293-4-5, 324, 341, 456*, 498 and especially the testimony of Mr. Stahlman, its official head.

EVIDENCE AS TO RATES, ESPECIALLY FOR LONG AND SHORT HAULS.

See evidence, pp. 174, 176, 192-3, 210, 236, 238, 275, 278, 279, 322*, 323*, 324*, 329, 332, 360.

A great bulk of testimony was devoted to setting up various theories and supposed cases concerning transportation and competition, and tending to prove, if the speculations of the witnesses can be considered sound, that it is just about as well to carry freights a long distance as a short one, and that it is justice to all intermediate places between so-called competing points to make the inhabitants of such places pay

more for transportation for a short distance than their neighbors and their competitors pay for transportation for a long distance.

It was shown (which is of judicial knowledge) that rail lines extended from New York and other Eastern cities as well as from the West to Augusta, and that sea-going lines existed from New York and many other Northeastern cities to all the Southern cities of the coast, and that lines existed in the gulf and on the Mississippi connecting with railways running everywhere.

Mr. Alexander, a most typical and intelligent witness for the respondents, said that the railway lines from Eastern cities to Augusta *could* participate in the business as against steamships, etc., but he declined to say that it could be done successfully. (Rec., p. 114.) In respect of the case in hand of transportation from Cincinnati to the points on the lines of the respondents, he advances the proposition that these discriminating rates, favoring certain localities, and injuring others, are just, because the "value" of the service is no greater for the long distance than for the short one, by which he says he means that competition determines the value of the service.

Mr. Fink undertakes to show that the cost of a long haul, under similar physical circumstances, is less per mile than the cost of a short haul at the same rates per mile, or, in other words, that the profit of such a long haul is greater than the profit on the short haul, which nobody disputes He then goes into the subject of competition of all kinds and the inducements which lead railways either to compete or to combine, and takes into consideration the great public motives that lead railway lines to stimulate manufactures in one place and markets in another, according to their judgment of what is for the public interest and their own.

Mr. Smith states the various points of competition in various places and the principles on which rates are arranged and the necessity of meeting water com-

petition, and that railways went into reduced rates on coal as against wood for the purpose of stimulating the transportation of coal and its use as against the use of wood, as if that were a part of the public mission of a carrier.

Mr. Goddard, Newman, Stubbs and Murray went over the same ground of theoretical competition between manufactures and markets and carriers, and the policies which lead carriers to put rates up or down and to make discriminations between places and distances according to their judgment of what is best for themselves and the public.

Mr. Peck does the same thing, and, coming down to facts, he thinks that the rate from Cincinnati to Atlanta of $1.07 per hundred is reasonable, but has no data for the opinion; and he thinks that from Cincinnati to Augusta a reasonable rate would be $1.37, which he says would be about "the usual increase in proportion to distance," but he thinks that under "existing circumstances," whatever that may mean, that it is reasonable to charge the same rate from Cincinnati to Augusta as to Atlanta. He thinks that 30 cents from Atlanta to Social Circle is a reasonable rate, because the Georgia commission has fixed that rate, but has no data for an opinion of his own. Being asked to explain the reasonableness of 30 cents per hundred from Atlanta to Social Circle as against $1 07 from Cincinnati to Augusta, etc., he says that the rates of other lines to Augusta must control it, and than whatever the company can get is so much gained, and that if the total revenue is not unduly profitable, it is fair to all; but he says that where there is not competition, the one who uses the most tracks should pay the most money, and that if the business were done otherwise where there is competition the total profits would be diminished.

He says that the cost of service is a necessary element in the value of transportation, which value he defines to be the difference between the amount paid by the consumer and the amount received by

phia, Baltimore, and Norfolk, on the one side, and Wilmington, Charleston, Port Royal, Savannah, and Brunswick on the other side. The fourth (Ex. No. 4) shows the navigable rivers in the territory south of the Potomac and Ohio and east of the Mississippi, inclusive. He then, like the other witnesses, goes into a dissertation on the subject of competition, and he makes the rate from Cincinnati to Augusta to depend on the rates in force from Baltimore and other seaboard points, and, like the others, he includes in his theory of competition every relation and aspect of business and traffic, and then deduces the justification for acts like those complained of in this case. He says that the rates from Cincinnati to Atlanta and Augusta are the same by all the rail lines, and that that is in pursuance of an understanding through the medium of the railway and steamship association to maintain the rates in that way. (Rec., p. 250).

Mr. Fitzgerald says that the water lines make the rate from north Atlantic ports to the southern ones, and that the Savannah River fixes the rail-line rates from Savannah to Augusta and also from Charleston, and he goes through with the theories of market, commodities, and railroad competition like the others. He describes the lines from Eastern ports to Augusta, etc., but he does not appear to make the Savannah River a link in the chain of actual operation. (Rec., pp. 275–277). He says that the rates from Cincinnati to Atlanta and Augusta make a profit to the carrier.

Mr. Stahlman says he is the Commissioner of the Southern Railway and Steamship Association; that the association was organized for the purpose of preventing "ruinous competition" between the lines forming it. (Rec., p. 280.) He gives the names of the lines not in the association. (Rec., p. 281.) He describes competing points and speaks of the Savannah River prior to the building of the railroads to Augusta, and then states his theories of the various phases and places of competition, etc. He describes the water transportation reaching Savannah and other ports, but does not include Augusta. (Rec., p. 297.) He says that the reason why the rates are higher to Social Circle than for the longer distances over the same road is

because "the town of Social Circle has but one railroad, while the city of Atlanta has seven." (Rec, p 308.) He states the lines *actually* competing between Cincinnati and Atlanta and between Cincinnati and Augusta (Rec., p. 312–314), in which list he does not include any waterway other than the Ohio River to Memphis and Huntington, Miss.

He says that the rates from Cincinnati to Augusta furnished a profit. (Rec., p. 316.) He says the rate to Social Circle is reasonable, notwithstanding it is 119 miles nearer Cincinnati than Augusta is, and that the rate to Augusta is reasonable and fairly remunerative in view of the larger traffic, and that a higher rate would diminish traffic, etc. (Rec., p. 329.) And he does not consider that the difference of 119 miles is "much of a factor" in respect to the reasonableness or unreasonableness of rates either to Augusta or Social Circle (Rec., p. 330), and he repeats that, in coming to his conclusion as to the justice of existing conditions, he did not take into consideration distance at all. (Rec., p. 332.)

This witness also testified that complaints as to the rates to all these points in Georgia had been continued and vigorous, and that many of the railroad managers had become utterly convinced that said rates were too high. The subject is discussed hereafter.

Mr. Erwin speaks to the action of the Georgia Railroad Commission and presents the laws of Georgia, the commissioner's regulations, etc.

Mr. Sikes, presents a statement purporting to show the relationship between through and local business of the Georgia Railroad.

Mr. Hillyer speaks of the same paper and explains the paper in its relation to tons moved 1 mile and revenue, and says that during the period covered by the paper the Georgia Railroad would have lost $418,245 if all the "local freights" had been hauled at through rates, and that the statement covers 307 miles of road; and he states gross

phia, Baltimore, and Norfolk, on the one side, and Wilmington, Charleston, Port Royal, Savannah, and Brunswick on the other side. The fourth (Ex. No. 4) shows the navigable rivers in the territory south of the Potomac and Ohio and east of the Mississippi, inclusive. He then, like the other witnesses, goes into a dissertation on the subject of competition, and he makes the rate from Cincinnati to Augusta to depend on the rates in force from Baltimore and other seaboard points, and, like the others, he includes in his theory of competition every relation and aspect of business and traffic, and then deduces the justification for acts like those complained of in this case. He says that the rates from Cincinnati to Atlanta and Augusta are the same by all the rail lines, and that that is in pursuance of an understanding through the medium of the railway and steamship association to maintain the rates in that way. (Rec., p. 250).

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because "the town of Social Circle has but one railroad, while the city of Atlanta has seven." (Rec, p 308.) He states the lines *actually* competing between Cincinnati and Atlanta and between Cincinnati and Augusta (Rec., p. 312–314), in which list he does not include any waterway other than the Ohio River to Memphis and Huntington, Miss.

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receipts and expenses, etc. He says that freight from Cincinnati destined for Social Circle is shipped on through bills of lading. (Rec., pp. 396, 397.) He says he cannot explain the discriminations made in favor of other towns on the Georgia Railroad. (Rec., p. 399.)

Mr. Green says that the Georgia Railroad has been managed economically, and he files copies of the tariffs, and he says that the road receives less for its part of the service from Atlanta to Augusta than from Atlanta to Social Circle. (Rec., p. 408.)

Mr. Marsh states that the result of an experiment as to the cost of running a through freight train from Atlanta to Augusta, and makes the cost per ton per mile of gross weight of the train about one-fifth of 1 cent, and for the freight about nine-tenths of 1 cent, and the local freight about one half of a cent (Rec., p. 411), etc; that a part of the freight so experimented with was not carried all the way through (Rec., p. 416); that he has not the figures and the papers from which his results are made up. He states the difference of their receipts on buggies as between Cincinnati and Social Circle and Cincinnati and Augusta. (Rec., p. 421.)

Mr. Dennis says that in the movement of first-class freight from Cincinnati to Augusta, if the rate had been $1 the amount of loss of gross receipts after July 20, 1891, would have been, in his opinion, $2,000.

Mr. Barnes says that the steamer *Katie* plies on the Savannah River between Augusta and Savannah, distance 200 miles, time required six days round trip, steamer can carry 200 tons; that it is the only steamer in that trade; that with full cargoes he would be willing to accept 30 cents per hundred. He thinks the boats carried about 20 per cent of the eastern freights to Augusta; that navigation is interrupted at times by low water and sand bars; that the amount his boat does is not freights from Augusta eastward, but from Savannah upward, being about 75 tons per week; that his charges run from 25 to 50 cents per 100 pounds, and that he is working on a rate of 41 cents for

first-class; that merchants will never ship by boats when they can get as good a rate by railroad, and that when boats are put on the railways cut rates.

Mr. Raymond speaks of a line of steamers between New York and Brunswick that *can* carry 2,000 to 4,000 tons; that there are two boats; that the round trip occupies 14 days; rate 65 cents per 100 pounds, *fixed by the association*, and when destined for interior points 30 to 54 cents, and when the traffic comes from the West to New York, destined for Brunswick, 30 cents, and to Augusta, etc., 24 to 30 cents; when destined for Mobile, Memphis, etc., 18 and 22 cents.

Mr. Miller says that the Cincinnati, New Orleans and Texas Pacific Company carries goods from Cincinnati to Social Circle, Augusta, etc., so far as its line extends, and that he sends freight to the local stations on the Georgia road, as Social Circle, by Chattanooga and Atlanta and the Georgia Railroad; that the other routes are the Louisville and Nashville, via Nashville and Atlanta; the Louisville and Nashville via Jellico and the East Tennessee road, and via Norton and the Norfolk and Western, and Richmond and Danville roads, and by the Chesapeake and Ohio, and Richmond and Danville, and Augusta, and by the Ohio and Mississippi, via Louisville, and by trunk lines and North Atlantic coast points in connection with steamers to Charleston and Savannah.

He then discusses the elements of policy respecting making rates; that the movement from Cincinnati, etc., via the Atlantic ports is very small, but from Chicago, etc., via the Atlantic ports it is large, and affects Cincinnati rates. That eastern cities compete with Cincinnati and western markets for the trade of Augusta and the South; that the water lines from the eastern cities are controlling factors in making rates and affect rates from Cincinnati by market competition indirectly. (Rec., p. 452, 453.) That an increase of rates would be an advantage to the Eastern seaboard cities. (Rec., p. 453.) That his company belongs to the association. That the association exists for the purpose of making "uniform and reasonable rates." (Rec., p. 454.) That the rates from Cincinnati to Atlanta, Au-

gusta and Social Circle are the same, and are prorated between the various roads on an agreed basis, viz., actual mileage on freight to Atlanta and Augusta, but to Social Circle on Atlanta mileage. (Rec., p. 455.) That if the freights are prepaid they are divided with the other roads on the basis of mileage to Augusta, and on freight to Social Circle the local rate is paid over to the Georgia Railroad. *That all the lines agree that the association shall control.* (Rec., p. 456.) That his company posted the rates to Social Circle; that *now* the Georgia road requests him not to issue through rates to intermediate points on its line, and he does not do it except where shippers demand it. (Rec., pp. 456, 457.) But he would issue a single through bill of lading as before. (Rec., p. 457.) That the competition before described creates dissimilar circumstances. That distance and cost of service does not control, because of the competition. (Rec., pp. 459, 460.) That the lines out of Cincinnati do not quote rates thence to the seaboard and so south to interior points. (Rec., p. 460.) From his testimony it appears that to all these Georgia points there is by common agreement "continuity of service and singleness of charge."

Mr. Blanchard discusses the considerations affecting rates, competition, etc., and what he thinks dissimilarities of circumstances, etc.

Mr. Miller again discusses the subject of rate making, etc., and thinks that difference in circumstances, etc., justifies sometimes a less charge for the longer distance. (Rec., p. 509.) That in respect of arrangements of rates, none is necessary while other roads charge their local rates, and that from Cincinnati to Social Circle there is no rate arrangement other than the demand of that company for their local rates, but he does not mean to modify what he had before said in respect to an *arrangement for a continuous shipment* between Cincinnati and *all* points in Georgia. (Rec., p. 511.)

Mr. Trammell says that he thinks the rates in question based upon mileage and tonnage are unjust, the Social Circle rate being too high. (Rec., p. 513.) He says that under existing conditions the rate made to Social Circle as compared with that to Augusta should not be higher. (Rec., p. 516.)

Mr. Fort says that he thinks the discriminative rate to Social Circle is unreasonable and unjust. (Rec., p. 518.)

Mr. Hand says the same. (Rec., p. 521.)

Mr. Shepard says that he resides at Social Circle, doing business there, and purchased a lot of buggies from the original complainant, the same referred to in the proceedings; that he could not and did not buy more at the same price because of the high rate of freight to Social Circle.

Mr. James, president of the buggy company, says that it is a large manufacturer of buggies; that within the circle drawn on the map shown him, Cincinnati being the center and Atlanta the one point on the circumference, he can find no rate as high as $1.07 unless, possibly, that to Charlotte, N. C.; that the rate to Birmingham, which is outside the circle, is only 89 cents, though Birmingham, in his opinion, has no advantage over Atlanta as a matter of competition between carriers; that there is substantially no competition between his works and eastern manufacturers for the Georgia markets, nor for Birmingham. (Rec., p. 626.)

This map illustrates in a very marked manner the fact that the rates to these points in Georgia are, as compared with other communities, not only unreasonable in themselves, but also relatively unjust.

The map also shows the boundaries of the territory of the Southern Railway and Steamship Association, and is explanatory of what is said hereafter in respect of the combination of the carriers dominant in that important and large section of the country. (This map may be presented in our other brief.)

AS TO WHAT IS A "LINE."

Evidence other than that in the answers appears in the record, as follows:

The bills of lading issued by the Cincinnati, New Orleans and Texas Pacific Railway Company from Cincinnati, Ohio, to Augusta *or* to Social Circle, both or either, contained this stipulation: "No carrier or company forming *a part of this line* over which said freight shall be transported will be responsible for the detention at its terminus or beyond on any *part of the line*, arising from any accumulation or over-pressure of business." Record pages 403 4.

The heading of Exhibit 6 (page 269 record) is:

"Queen and Crescent Fast Freight *Line*, made up of the following lines."

On the opposite page is "Governed by Southern Railway and Steamship Association Classification." Record, 269.

And the following pages of the record should be examined, 13, 22, 23, 46, 49, 50, 126, 200, 207–8–9, 221–2–4, 403–4, 269, 270, 275, 277, 283, 312, 314, 341–2–3–5–8, 350–1–2.

On the third of June, 1893, Hon. Wm. T. Newman, U. S. Judge for the Northern District of Georgia, after hearing the evidence and argument, refused to order the railroad company, defendants, to stop charging more than one dollar per hundred pounds on first-class freight, and refused to grant any part of the relief prayed for. (Record, pp., 72–95, inclusive.) Therefore, the Interstate Commerce Commission took the cause to the U. S. Court of Appeals at New Orleans, Louisiana, upon errors assigned, as follows:

1. The court erred in holding that it had the power, under the interstate commerce act, to hear the case upon issues and pleadings other than those presented to the Commission at the original hearing. The contention of the appellant was that the court was restricted to those issues which were raised by the pleadings before the Interstate Commerce Commission, and that no evidence could be offered or considered by the court except such as would be admissible under the issues raised in the pleadings before the Commission.

2. The court erred in holding "that the traffic from Cincinnati to Social Circle, as to the Georgia Railroad Company, is local, and that company is not, on the facts presented, made a party to a joint or common arrangement such as makes the traffic to Social Circle subject to the control of the Interstate Commerce Commission, and in holding that the defendant carriers did not constitute a *line* from Cincinnati to Social Circle."

3. That the court erred in holding "that the arrangement for a through rate, for there is unquestionably a joint tariff from Cincinnati to Augusta, constitutes a '*new line*' from Cincinnati to Augusta, and following Osborn *vs.* Chi-

cago and Northwestern Railroad Company and the United States *vs.* Mellen and others, traffic to a local point on the Georgia Railroad at strictly local rates cannot be compared with traffic over the 'new line' from Cincinnati to Augusta for the purpose of raising a question under the long and short haul clause of the interstate commerce act."

4. The court erred in holding that competition constitutes a dissimilar circumstance and condition under the fourth section of the interstate commerce act, and that competition, generally speaking, must be considered in applying the phrase "under substantially similar circumstances and conditions" in any given case.

5. That the court erred in holding that competition of carrier with carrier, both subject to the act, constitutes substantially such a similar circumstance and condition as will relieve the carrier from the operations of the fourth section of the interstate commerce act, and in holding that such competition will authorize the carrier to act upon its own judgment in charging a greater rate for the shorter than the longer haul without first invoking the exercise of the discretion of the Commission provided for in said section.

6. That the court erred in holding that competition of market with market constituted such a dissimilar circumstance and condition as would relieve the carrier from the operations of the fourth section of the act on its own judgment in charging a greater rate for the shorter than the longer haul, without first invoking the exercise of the discretion of the commission provided for in said section.

7. That the court erred in holding that the rate from Cincinnati to Augusta, and from Cincinnati to Social Circle, was not an undue preference under section third of the act to regulate commerce in favor of Augusta, or an undue prejudice or disadvantage against Social Circle.

8. That the court erred in holding that the rates of freight established and maintained by the Southern Railway and Steamship Association, of which the defendant carriers are members, are fixed and governed by competition.

9. That the court erred in holding that the evidence in the case showed that there was competition of carrier with

carrier between Cincinnati and Atlanta, and that said competition is real and influential.

10. That the court erred in holding that the evidence showed the existence of competition of Baltimore and other Eastern cities with Cincinnati for the trade of Augusta, and that said competition was active and influential.

11. That the court erred in holding that it was not justified in granting the order prayed for by the Commission, requiring the defendant corporations to desist from charging a greater rate than $1 per hundred pounds on first-class freight in less than carload lots from Cincinnati to Atlanta, and in refusing to grant said order as prayed for.

12. That the court erred in not holding that competition is excluded as a differentiating circumstance and condition in the fourth section of the act to regulate commerce.

13. That the court erred in not holding that as to competition of carrier with carrier, subject to the act, the circumstances and conditions are not presumptively dissimilar, and that the carrier in all such instances of competition must first invoke the exercise of the discretion vested in the Commission before charging a greater rate for the short than for the long haul.

14. That the court erred in not holding that the competition of market with market did not constitute a dissimilar circumstance and condition, and in not holding that in all such instances of competition the carrier should first invoke the discretion vested in the Commission before charging a greater rate for the short than the long haul.

15. That the court erred in not passing upon the various objections to the admission of testimony set forth in the record of the evidence.

16. That the court erred in not holding that the three defendant carriers constituted *a line*, in contemplation of the fourth section of "the act to regulate commerce," from Cincinnati to Social Circle.

17. That the court erred in holding that the com-

plainants are not entitled to a decree enforcing either its order as to the Social Circle rate or the rate from Cincinnati to Atlanta and in dismissing the bill (copy of which order is attached to the bill), and in refusing the injunction prayed for, restraining the defendants, their officers, servants, and attorneys from further continuing violation and disobedience to the said order of the Commission.

18. That the court erred in not finding and granting a decree, under the law and evidence in the case, enforcing the order of the Interstate Commerce Commission as prayed for in the bill, and granting the injunction prayed for, restraining the defendants from violating and disobeying the order of the Commission. Record, 97–99.

On the 29th of May, 1894, the Court of Appeals reversed the decision of Judge Newman, but wrote no opinion. It ordered an injunction against charging more freight on buggies, etc., to Social Circle than to Augusta, Georgia, but made no judgment as to the reasonableness of the rates. Record, 532.

That judgment of the Court of Appeals is here upon an Assignment of Errors as follows :

I.

"That said circuit court of appeals erred in annulling, avoiding, and reversing the decree rendered in the above-entitled cause on June 5th, 1893, by the circuit court of the United States for the northern district of Georgia.

II.

That said circuit court of appeals erred in remanding the above-entitled cause to said circuit court for the northern district of Georgia.

III.

That said circuit court of appeals erred in instructing said circuit court for the northern district of Georgia to enter a decree in favor of complainant, The Interstate Commerce Commission, and against the defendants, The Cin-

cinnati, New Orleans and Texas Pacific Railway Company, The Western and Atlantic Railroad Company, and The Georgia Railroad Company, commanding and restraining the said defendants, their officers, servants, and attorneys, to cease and desist from making any greater charge in the aggregate on buggies, carriages, and on other freight of the first class carried in less than car-loads from Cincinnati to Social Circle than they charge on such freight from Cincinnati to Augusta; that they so desist within five days after the entry of the decree; and in case they or any of them shall fail to obey said order condemning said defendants and each of them to pay one hundred dollars a day for every day thereafter they shall so fail.

IV.

That said circuit court of appeals erred in decreeing that the said Cincinnati, New Orleans and Texas Pacific Railway Company, the Western and Atlantic Railway Company, and the Georgia Railroad Company be condemned *in solido* to pay the costs of said cause in said circuit court of appeals.

V.

The said circuit court of appeals erred in not affirming said decree rendered in said cause June 5th, 1893, by said circuit court for the northern district of Georgia.

VI.

That said circuit court of appeals erred because it failed to adjudge and decree that the matters of equity alleged in the bill filed in the above-entitled cause are fully denied in the answer and are not sustained by the proof, and that said bill be dismissed.

VII.

Said circuit court of appeals erred because it *in effect* decided that said above-named defendants are under a common control, management, or arrangement for continuous carriage or shipment, and are engaged in the transportation of passengers and property wholly by railroad between Cincinnati, Ohio, and Social Circle, Georgia.

VIII.

That said circuit court of appeals erred because it *in effect* decided that the rates charged by the above-named defendants for the transportation of buggies, carriages, and other freight of the first class carried by them in less than car-loads from Cincinnati, Ohio, to Social Circle, Georgia, are *unjust and unreasonable.*

IX.

That said circuit court of appeals erred because it *in effect* decided that the transportation of buggies, carriages, and other freight of the first class carried by the above-named defendants in less than car-loads from Cincinnati, Ohio, to Social Circle, Georgia, is a like and contemporaneous service, under substantially similar circumstances and conditions with the transportation of buggies, carriages, and other freight of the first class carried by the above-named defendants in less than car-loads from Cincinnati, Ohio, to Augusta, Georgia.

X.

That said circuit court of appeals erred because it *in effect* decided that as the above-named defendants make a greater charge in the aggregate on buggies, carriages, and other freight of the first class carried by them in less than car-loads from Cincinnati, Ohio, to Social Circle, Georgia, than they make on such freight from Cincinnati, Ohio, to Augusta, Georgia, they thereby give to Augusta, Georgia, and its traffic an undue or unreasonable preference or advantage and subject Social Circle, Georgia, and its traffic to an undue or unreasonable prejudice or disadvantage.

XI.

That said circuit court of appeals erred because it *in effect* decided that the transportation by the above-named defendants of buggies, carriages, and other freight of the first class carried by them in less than car-loads from Cincinnati, Ohio, to Social Circle, Georgia, is transportation conducted under substantially similar circumstances and conditions for a shorter than for a longer distance over the same lines in the same direction, the shorter being included within the longer distance, as compared with the transportation

by the above-named defendants of buggies, carriages and other freight of the first class carried by them in less than car-loads from Cincinnati, Ohio, to Augusta, Georgia.

XII.

That said circuit court of appeals erred because it *in effect* decided that all of the above-named defendants join in the transportation of buggies, carriages, and other freight of the first class in less than car-loads from Cincinnati, Ohio, to Social Circle, Georgia, whereas the defendants, The Cincinnati, New Orleans and Texas Pacific Railway Company, The Western and Atlantic Railroad Company, alone join in the carriage of such freight from Cincinnati, Ohio, to Atlanta, Georgia, and the defendants, The Louisville and Nashville Railroad Company and The Central Railroad and Banking Company of Georgia (who are sued as the Georgia Railroad Company) alone carry such freight from Atlanta to Social Circle, Georgia.

XIII.

That said circuit court of appeals erred because it *in effect* decided that buggies, carriages, and other freight of the first class carried by the above-named defendants in less than car-loads from Cincinnati, Ohio, to Social Circle, Georgia, are carried over the same *line* as similar freights carried by the above-named defendants from Cincinnati, Ohio, to Social Circle, Georgia.

XIV.

That said circuit court of appeals erred because it *in effect* decided that the Interstate Commerce Commission has the power to *fix* the rates of transportation to be charged by common carriers who are subject to the act to regulate commerce."

BRIEF OF ARGUMENT.

I.

We might well object that the errors assigned are too general and are too indefinite. For instance, the first and second are general. The third doesn't disclose whether the complaint is as to the classification, as to the limit of time or as to the amount of penalty or that it applies to each

appellant. The grounds from seven to fourteen, inclusive, complains only of alleged decisions "*in effect*" made without other specifications.

II.

You will observe the emphasis placed on "other merchandise," etc., in these answers. A part of the defendants' contention below was that the order of the Commission was too broad, in that the Commission was put in motion by the Buggy Company only, and it was dealing only with buggies, and had no right to make any general ruling as to *other merchandise*, because buggies were the only thing in controversy.

Appellant answers, said they deal with "buggies, etc.," and with buggies "and other merchandise," and pursuant to that we took a volume of testimony, some on either side, but mostly theirs. Buggies were mentioned perhaps only three times in that volume of four hundred pages. In other words, the answers state that what is due to buggies is due to everything else of that class; what is improper for buggies is improper for everything else in that class; and we tested the question generally by examining generally as to all merchandise of that class. Now they complain that the order was too general for the case tried.

It seems to us, that the appellants, by said conduct, are estopped on that point. The Interstate Commerce Act, the Commissioners, the carriers of the country and the parties in this cause deal with freights by classes and the court could not do otherwise and meet the questions raised.

III.

The sum of all this testimony, leaving aside the statements and speculations of the so-called experts, as to the meaning of the words of the statute, is to leave the case substantially as it stood before the Commission; for the whole bulk of it is really devoted to the statement of connections and traffic arrangements which were before the Commission and were the public geographic relations of rail and water means of carriage, and all the theories and illustrations of the witnesses are nothing more than arguments designed to justify the discrimination confessedly made.

Opinions of the Interstate Commerce Commission as to rates are of great value before this tribunal. They are made by men of large experience, who have devoted themselves to this work and were selected because of their special excellence for the work to be done. The Commission is nonpartisan. Under the statute it is obliged to be disinterested, and it has all the information that needs to be had in its office, filed there according to law. When it made its decision in the case, it made it practically with every fact before them which it is claimed has been brought into the case since.

Now your Honors know that by law the decisions in one department of our government are not to be overruled except under certain exceptions that do not obtain here. It is very important for the court, which frequently has to send a case to a master to find facts and all that kind of thing, to understand who these people are, what information they have, why they act and upon what grounds they act, so as to know what weight to give to their findings, although they may be only *prima facie* evidence. It may be overcome, but it takes more to overcome the findings of such a body as this Interstate Commerce Commission than it would to overcome the mere *ipse dixit* of an individual or body not so organized or of such importance.

But if we take up the latitudinarian construction in favor of the carriers, which is always insisted upon by them, and has been sometimes, as in this case, recognized by judges, but which is a destructive construction, so far as it regards any efficacy of the law, there is still, as we insist, no ground for overturning the order of the Commission. It is amazing, taking this case by itself, to find that a court of the United States has overturned an order of the Commission under circumstances undisputed, where the carriers have entered into a written combination to make their rates all around, over a vast extent of territory, in a way to suit themselves, and for their own expediency, have so adjusted them as to destroy the trade between all points that they do not choose to consider competitive ones, by producing the gross discriminations between traffic going to one place and traffic going to another over the same line.

This, as shown in the solemn articles of agreement still in force which the Southern Railway and Steamship Association has made, over this great extent of country with its millions of customers and its thousands of railway stations, the absolute prisoner of the Association, not by competition, but by a tyrannical combination as complete and absolute as if a single corporation were the proprietor and were operating all the lines within that territory. If such a combination and state of things is to be vindicated in a court of law as against the provisions of the interstate commerce act, it is impossible to imagine any case in which the courts of law could give its intended effect. The motives which led the various carriers to form this alliance, offensive, defensive, coercive, and absolute, holding at their mercy all the traffic within this great area, can have no bearing upon fact. Their motives may have been that without such an alliance there would be warfare of rates, competition, etc. That is the same motive that on the same principle has led to the formation of whatever of tyranny exists in the management of the affairs of mankind.

But these carriers' pretentions of justification, derived from competition, etc., are, on their own basis of claim, utterly indefensible. As to the competition of markets and places of production, we assume that it will not be seriously or sincerely contended that the interstate commerce act intended to make that an element upon which carriers could act in respect of what they might think would be the promotion of the general welfare by increasing the trade of one city and diminishing that of another, or by undertaking to equalize, in their judgment and as they should think it ought to be, the productions and the traffic or the markets of any or all of them. And yet in some, if not all, of the formal answers of these respondents before the Commission that was the sole ground upon which their defense was put.

IV.

WHAT ARE SUBSTANTIALLY SIMILAR CIRCUMSTANCES AND CONDITIONS?

The railroad companies attempted to prove by testimony of experts that the words "substantially similar circumstances and conditions" had received a

well understood and defined meaning among railroad men at the time of the passage of the Act to regulate commerce.

This attempt failed most signally; all of the witnesses, which include many of the best known names connected with the railroad management of this country, concurred in saying that these words were not of the sort to which a technical meaning had been given.

See the evidence at pages 336–8, 459, 461, 463–4–6–8, 496–7, 500, 505–6. As to water competition, see 442, 524.

It is agreed that the "old law," here and in England, may throw light on the subject.

In the court below Mr. Baxter in his brief cited certain cases to show what the English courts had done prior to our Act.

In the first place, there is the class of cases in his brief in which it is decided that "the origin or antecedents of a traffic" do not make different circumstances.

There is that class of cases which decide that the *ultimate use* to which freight is to be put does not make a different circumstance.

"To diminish the natural advantages which the position of the plaintiff and other dealers at Ipswich, by reason of its greater proximity, gave them over the dealers at Petersborough, in respect to the traffic of a certain territory, by annihilating in point of expense of carriage a certain portion of the distance between Petersborough and aforesaid territory," is not covered by the English Act.

"The next class of English cases to be considered is where the courts have held that a railway company has no right to give to some of its local shippers the

benefit of competitive rates while it refuses those rates to other local shippers upon some ground that is capricious, arbitrary and unreasonable."

"The next class of English cases to be considered, is where the courts have held that a railway company cannot legally discriminate in favor of one local shipper against another local shipper merely to prevent the threatened construction of a competitive railway line."

"The courts have held that a railway company cannot legally discriminate in favor of one local shipper against another local shipper simply because the former had agreed to ship the whole, or some indefinite amount of his traffic over the defendant's line, while the other has not."

"The next class of English cases to be considered is where the courts have held that a railway company cannot legally discriminate in favor of one shipper against another shipper, shipping the same class of freight between the same competitive points, unless there be some substantial difference in the cost of the service to the company."

So much for those English cases cited by our opponents below. We call attention to others:

Section *fifty* of the English traffic act of 7 and 8 Vict., c. 3 (the full text of which is copied in a note to Sutton's case on p. 228, 4 Eng. and Irish Appeals), provided for equal charges for the transportation of persons and property, where the service was rendered "*under like circumstances*," the court held that the qualifying word, "like," did not require the circumstances to be identical (see discussion of this by Willes, J., 4 Eng. and Irish Ap. p. 247), and from that time forward the definition given to the word "like," is fully and exactly expressed by the words, "substantially similar."

In 1868–'69, the case of *Railway Company* v. *Sutton* (*supra*) was decided in the House of Lords, and the ques-

tion of what constituted "like (substantially similar) circumstances" was the gist of the whole controversy. Mr. Justice Blackburn, said as to the meaning of these words, that the applied to the "*circumstances of the carriage*, and not to the trade of the consignor or consignee." Mr. Justice Willis said that goods were carried under like circumstances "where the rate (of speed), risk, and expense of carriage are the same."

In 1878, *Evershed's case* (3 App. cases, 1029) was considered by the House of Lords. This case is especially of interest in this discussion because it was held that under this phraseology competition did not differentiate the circumstances, and it was said that the fact that the persons who are charged less are so constituted that they could go by another road, and probably would do so, would not be a circumstance justifying an unequal charge.

In 1885, *The Denaby Main Coaling Company's case* (11 App. cases 97) was considered by the House of Lords. Again the gist of the controversy was the meaning of the words "like circumstances," and a very earnest effort was made to obtain a decision which would modify the definition given in the preceding cases. This case is peculiarly interesting because it discloses the element of competition of "market with market." Several opinions were delivered in the case. Mr. Justice Blackburn, who delivered one of the opinions in Sutton's case, in the Denaby case in 1868 said:

"I think it *finally settled* by *Great Western Railway Company* v. *Sutton* (L. R., 4; H. L., 226) and by *Evershed's case* (3 App., cases 1029) that for passing over the same portion of the railway the obligation to charge equally is imposed, if they are *under the same circumstances, and that the circumstances are those relating to the carriage of the goods*, not the person or the sender; that the fact that the persons who are charged with less are, as in *Evershed's case*, so constituted that they can go by another road, and

probably will do so if charged as much as the charge made to the complaining party, *is not a circumstance justifying an unequal charge.* Neither is it a difference of circumstances justifying an inequality of charge that those whom the railways charge less are seeking to develop a new trade."

There are many other English cases, more or less interesting because they bear upon the question of the statutory regulation of commerce; these three cases to which special attention is called above are the principal ones out of the whole mass of decisions which are of special importance, and they are so because they had given a precise and exact definition to the words which are found in the fourth section prior to the passage of the law here, and because they are the final decision of the court of last resort in England and, therefore, in accordance with familiar principles, that definition became a necessary and constituent part of our legislation; and this principle has been distinctly recognized by the Supreme Court with reference to the act to regulate commerce. (*Interstate C. C.* v. *B. & O. R. R.*, 145 U. S., 263.)

This court, in 145th United States Reports, held that certain of the words in the first and second sections of our act were taken from the English Act, and that so the English constructions as to *them* ought to affect the construction of our Act. Of course it is well known that the English statute did not have a long and short haul clause such as we have.

Those English decisions began with the case of Sutton. We call more special attention to that case.

In 1868–69, the case of *Railway Company* v. *Sutton* (*supra*) was decided in the House of Lords, and the question of what constituted "like (substantially similar) circumstances" was the gist of the whole controversy, as has been said above. It is reported in English and Irish Appeal Cases, volume 4, page 226. A large part of that case is made up of discussion as to whether the facts proved what was alleged.

But the law of the case is very plainly put. That case is a construction of the statute by the highest tribunal of that realm and largely after a review of the cases; and we might content ourselves with relying upon that case as the proper exposition of the law without the labor of going through the learned and lengthy brief which the gentlemen on the other side have furnished us in reviewing other English cases. That brief is extremely valuable, but we submit that it is only valuable to those who are curious to find out what A, B and C have said on the subject before the highest tribunal had fixed the meaning of the law.

I will read from the head-notes in that case.

"An absolute power in an Act of Parliament to fix charges for railway carriage is not rendered conditional by a subsequent clause requiring that all the charges made shall be made equally on like goods carried under like circumstances for all persons. The condition only attaches after the power has been exercised."

"A charge of so much per ton, and 50 per cent. in addition, is a tonnage charge, and therefore precisely within the words of the 50th section of the 7 and 8 Vict. c. iii."

"The words 'goods of a like description and quantity' and 'conveyed along the railway under the like circumstances' in the 7 and 8 Vict. c. iii., and 'goods of the same description' and 'under the same circumstances,' in the *Railways Clauses Act*, are used not with reference to the contents of the parcels, but to the parcels themselves, that is, *like or different for the purposes of carriage*—and these words are used with reference to the *conveyance of goods* and not to the persons who send them."

This case arose under this state of facts: An intercepting carrier, as they call him, was in the habit of collecting packages to be delivered along the way and putting them in one box or package, and then delivering the whole box or package to the railway

company and sending it to the special agent of the intercepting carrier who undertook to deliver them to the parties to whom the several small packages were directed, the same as do our express companies. The railroad companies allowed wholesale merchants and other people to do the same thing, but they said to this man we will not let you do it because you are an intercepting carrier; you cut off part of our income. This the Court held could not be done; and our friends say that is all they did hold; that was all that was in the judgment. We grant that, but the reasons they gave for it and the logic they applied to it are an argument in favor of our construction of our statute.

The case was argued learnedly by different gentlemen. Justice Blackburn delivered the opinion of the court, and at page 238 used this language:

"I think it appears from the preamble of the 90th section of the *Railways Clauses Consolidation Act* 1845, that the legislature was of opinion that the changed state of things arising from the general use of railways made it expedient to impose an obligation on railway companies acting as carriers *beyond* what is imposed on a carrier at common law.* And if this be borne in mind, I think the construction of the proviso for equality is clear, and is, that the defendants may, subject to the limitations in their special Acts, charge what they think fit, but not more to one person than they, during the same time, charge to others under the same circumstances. And I think it follows from this that if the defendants do charge more to one person than they, during the

* NOTE.—In delivering the opinion of the Supreme Court of the United States, in one of the Granger cases, Chief Justice Waite says: "Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created." The same doctrine has been announced in many cases since, with which we are all a miliar.

same time, charge to others, the charge is by virtue of the statute, extortionate. And I think that the rights and remedies of a person made to pay a charge beyond the limit of equality imposed by the statute *on railway companies actnig as carriers on their line* must be precisely the same as those of a person made to pay a charge beyond the limit imposed by the common law on ordinary carriers as being more than was reasonable."

"Again, the Court below spoke of the charge beyond the statutable limit of equality. But I think this applies to the description of the goods." Now listen to the language after quoting that: "But I think this applies to the description of the *goods* and the circumstances of the carriage, and not to the trade of the consignor or consignee." Well, it is true, that the decision did not decide the question at issue here, but it did say that the words, "of the like description and carried under the like circumstances," related to the goods and the carrier, the thing carried and the service rendered.

"The consignor in the present case was what has been called an 'intercepting carrier,' competing with the defendants," etc. They reviewed the authorities very generally.

They rely on the other side on the decision of Erle, C. J. This case is referred to on page 244 in this case of Sutton and the note is:

"It is scarcely necessary to say that I treat the views of Erle, C. J., with great respect, but I cannot but feel that they are based upon an assumption that the railway companies have a moral right to the monopoly of traffic on the lines which they have constructed, and that the Legislature could not intend to deprive the railway companies of the power to throw obstacles in the way of other carriers interfering with this monopoly. I do not think it falls within my province as a judge to inquire whether the Leg-

islature has been politic or not *; but for the reasons already given I think it clear that the Legislature did intend this very thing."

On the subject of these circumstances being the same, at page 245 he said this:

"The next objection is that the circumstances are not the same. I do not think it can be said as a matter of law that they are the same, but I think the jury might, on the evidence, properly draw the conclusion that they were. I have already intimated to your lordships my opinion that the circumstances must be those relating to the carriage, not to the consignor, and that the fact that the plaintiff was a rival carrier does not, in itself, make a difference in the circumstances such as to justify a difference in the charge under the statute; it rather makes against the defendants as supplying a motive for an attempt to evade the statutable provision; but I think there were matters in favor of the defendants which the jury had to consider."

You will observe there that the railroad's point was that they could not make their proper income if this intercepting special carrier was allowed to compel them to carry his packages at the same rates as for others. The Court say the statute has said they could not do that thing; that if he delivered a package like those of other people, they must carry it at the same rate.

On page 247 it is said:

"The question what is the meaning of the equality clause when it speaks of things of 'like description' conveyed under 'the like circumstances' ought, I think, to be answered by saying that things are of a 'like description' when, although their composition

* NOTE.--Chief Justice Marshall in the case of McCullock *v.* Maryland, 4 Wheat, 316 at 423, said: "Where the law is not prohibited (by the Constitution), and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative grounds."

and structure are not 'identical,' which would be expressed by 'the same description,' not 'like description,' they are similar in those qualities which affect *the risk and expense of carriage*, and that they are conveyed under like circumstances where *the route, risk and expense* are in the opinion of a jury the same, otherwise not."

Baron Bramwell delivered an opinion commencing at page 250, and on page 252 he made a distinction between water rates where, by reason of water, there is to be a discrimination.

There is an opinion by Lord Chelmsford, and in that he said on page 260:

"I have felt greater difficulty in ascertaining the meaning of the words 'under the same' or 'under like circumstances.' I do not see, however, how they can relate to anything else *than the conveyance of the goods.* To say that because the plaintiff is (what has been called) an intercepting carrier, and the other persons using the railway are wholesale dealers, therefore, the goods are not conveyed along the railway under the like circumstances, is an application of the words which I am unable to comprehend."

Evershed's case against the London and Northwestern Railway Company (at page 1029 of 3d Appeal Cases Law Reports, for 1877–78), was a contest about carrying which arose between certain brewers in regard to a preference which had been given to one, as was claimed, and the Lord Chancellor, at page 1035, said this:

"Now, as a matter of policy and expediency, it may well be that the appellants have good reasons for treating those other firms in the way they do; it may be that if they do not do that these other firms, *from the natural advantages of the situation* which they have been able to occupy, will send their goods by another railway and not by the railway of the appellants. *But with those considerations the plaintiff in the action has nothing whatever to do. That is exactly one of those things which Parliament has not left open to railway companies to judge of—whether in that way they will equalize their capacity for competing with other lines or not.* The one right, to my mind, the clear and undoubted right, of a public trader is to see that he is receiving from a railway com-

pany equal treatment with other traders of the same kind doing the same business and supplying the same *traffic*. In my opinion that is not the case with regard to this plaintiff, and therefore I think he is entitled to recover the moneys he has paid under protest."

Lord Blackburn, in concurring, made only this distinction:

"It may very well be that peculiar circumstances, as in some of the cases which have been referred to, make some difference. There may be the difference between wholesale and retail; a large quantity of goods may be carried cheaper than a smaller quantity of goods; that would be a difference of circumstances. And many other cases may be pointed out in which the circumstances would not be the same. But the argument here has been almost entirely this, that because of the two firms of brewers who have been mentioned happened to be situated as to the Midland Railway that they can get cheap carriage by the Midland Railway Company, and consequently will not go to the Northwestern Railway Company if the Northwestern Company charges them the ordinary rate, therefore, because there is that difference in the person, the Northwestern Railway Company may reduce the price to them *in order to tempt them to bring their traffic to that company.*"

That is exactly what they contend here.

"I quite agree that this is not done with any view of injuring, or intention to injure, Mr. Evershed. It is done with a view to *coax* some of the *traffic*, which would otherwise go upon the Midland Railway, to come to the Northwestern Railway. It may be (but I do not give any opinion as to that) that it would have been *provident and proper* on the part of the Legislature, in making the enactment, to say that there *should* be an exception in such cases, and that there might be a different rate given *in order to coax and induce traffic* to go by a different route from that by which it would otherwise have gone. However, whether that would have been a prudent and proper thing for the Legislature to say or not, it is not what the Legislature *has* said, and it is very likely that it was the intention of the Legislature not to say it, because it was thought that if equality of charge is to be disregarded under *any* circum-

stances, that might be made a cloak for making inequalities of charge under unjustifiable circumstances. I do not know whether that was the motive and intention of the Legislature or not, and I do not inquire. What the Legislature has clearly said is that the tolls must be charged equally to all persons under the same circumstances. I think that means under similar circumstances *as to the goods*, not as to persons. I do not think the person comes into the question at all." And that was the judgment in that case.

In (11 App. Cases 97) the Denaby Main Coaling Company's case. On page 120, the Judge said :

"I think it is finally settled by Great Western Railway Company *v.* Sutton (1) and Evershed's case (2), that if passing over the same portion of the railway" (a fact which was not disputed in either of these cases), "the obligation to charge, in respect of goods of the same description equally, is imposed if they are "under the same circumstances," and that the circumstances are those *relating to the carriage of the goods not the person of the sender ;* that the fact that the persons who are charged less are, as in Evershed's case (2), so situated that they *can* go by another route, and *probably will* do so if charged as much as the charge made to the complaining party, is not a circumstance justifying an unequal charge. Neither is it a difference of circumstances justifying an inequality of charge that those whom the railway charges less are seeking to develop a new trade."

Now those were the English decisions prior to our Act. They simply have declared in different forms that none of those things made legal differences. Why ? Because, they say, what Parliament meant was *like circumstances* with *regard to the transportation;* not as to persons ; not as to this thing or the other in the way of any of the eleven examples given, but what plain, common men understand by it ; what the words mean in the dictionary; and they said one might persuade them that Parliament should have

allowed so and so, but that Parliament did not so allow. And if we are right, if Congress had a right to deal with this subject, then, of course, the meaning of the words is to control.

The American decisions we submit in a separate pamphlet filed herewith as part of our brief.

OUR ARGUMENT WILL BE STRENGTHENED BY COMING TO THIS SIDE OF THE ATLANTIC AND EXAMINING THE HISTORY OF LONG AND SHORT HAUL LEGISLATION.

The Granger law was passed in Michigan in 1871; in Iowa, in Illinois, in Wisconsin, and in Massachusetts in 1874. The language of the law in Massachusetts was:

No railroad corporation shall charge or receive for the transportation of freight to any station on its road a greater sum than is at the time charged or received for the transportation of the like class and quantity of freight from the same original point of departure to a station at a greater distance on its road in the same direction. (Statutes of Massachusetts, chap. 112, sec. 190.)

It is said that that law has been strictly enforced.

The Railroad Commission of New York, in its report on the pro rata bill of 1884, p. 120, said as follows:

"Railroads should not, as a general rule, charge more between a terminal and an intermediate point, for a like class and quantity of freight, than is charged between such terminal and a more distant point, even though at such more distant point there may be railroad or water competition, unless railroads can affirmatively establish such circumstances governing such competition as justify the higher charge for the shorter distance."

In *Moon* v. *The New York, Ontario and Western*, competition with a rival railway was held not sufficient to justify the infraction of the principle. (*See* N. Y. Railroad Commissioners' Report (1885), pp. 73–76.)

In *Foot et al.* v. *The Utica and Black River Railroad*, it was held that higher charges might sometimes be made to intermediate points, but that the peculiar circumstances were not sufficient in this case. (*See* N. Y. R. R. Com. Report (1884), pp. 94–131; especially pp. 106 and 119.)

In *Harding & Hollis* v. *Rome, Watertown and Oswego Railroad*, water competition which would have given the business to *foreign* companies, was held to be a valid reason for the infraction of the rule. (*See* N. Y. R. R. Com. Report (1884), p. 160.)

Cardwell's Traffic Act of 1884 in England was, "No company shall make or give any undue or unreasonable preference or advantage to, or in favor of, any particular person or company, or any particular description of traffic, in any respect whatsoever." It applied only to persons, but railways might prefer one class of traders, or one portion of their traffic, if the conditions were the same to all persons and for the benefit of the company. (*See* 1 Shelford's Law of Railways, 4th ed., pp. 166–174.)

There were, sometimes, under the English practice, discriminations allowed as between home and foreign trade. Thus, in the case of Stockton & Darlington, coal for export was allowed to be taxed 4*d* per ton-mile, while home coal was taxed only one-half penny.

The history of such legislation here may be traced in all the *post bellum* constitutions of our States. Michigan began in 1870 by prohibiting consolidations of railroads "parallel or competing." In 1872 West Virginia made it the duty of her legislature to establish maximum rates, to correct abuses, and prevent unjust discriminations between through and local or way freight or passenger tariffs, etc. In 1873 Pennsylvania, on the 16th of December, in her new constitution provided as follows:

ARTICLE XVII.

SEC. 1. Connect at the State line with railroads of other States * * * and shall receive and transport each other's passengers, tonnage, and cars, loaded or empty, without delay or discrimination.

* * * * * *

SEC. 3. All individuals, associations, and corporations shall have equal right to have persons and property transported over railroads and canals, and no undue or unreasonable discrimination shall be made in charges for or in facilities for transportation of freight or passengers within the State or coming or going to any other State. Persons and property transported over any railroad shall be delivered at any station at charges not exceeding the charges for transportation of persons and property of the same class in the same direction to any more distant station, but excursions and commutation tickets may be issued at special rates.

Section 4 forbids consolidation with any "corporation owning or having under its control a parallel or competing line; nor shall any officer of such road or canal corporation act as an officer of any other road or canal corporation owning or having control of a parallel or competing line, and the question whether roads or canals are parallel or competing lines shall, when demanded by the party complainant, be heard by a jury, as in other civil questions."

Section 7 forbade "discrimination in charges or facilities for transportation by abatement, drawback, or otherwise," and preferences in furnishing cars or motive power, etc.

1874, October 13, Arkansas, Article XVII. Same as above as to connecting. Section 3 forbids "undue or unreasonable discrimination * * * in charges for or facilities for transportation of freight or passengers within the State or coming from or going to any other State. Persons and property transported over any railroad shall be delivered at any station at charges not exceeding the charges for transportation of persons and property of the same class, *in the same direction*, to any more distant station. But excursion and commutation tickets may be issued at special rates."

Section 4 makes the question whether railroads or canals are parallel or competing lines "triable" by a jury as in civil cases.

Section 10. Same as section 2 above, except "excursion charges" in lieu of extortion.

On October 12, 1875, Nebraska copied the constitution of Michigan.

On the 30th of October, 1874, Missouri put into her new constitution:

ARTICLE XII.

SEC. 12. It shall not be lawful in this State for any railway company to charge for freight or passengers a greater amount for the transportation of the same for a like distance than the amount charged for any greater distance, * * * but excursion and commutation tickets may be issued at special rates.

Its other sections in that article authorized the railroads to connect wilh each other and with roads of other States, required the correction of "abuses, unjust discriminations, and extortions," forbade consolidation of parallel or competing lines. and denounced "abatements, drawbacks," and other devices for discrimination.

On November 16, 1875, Alabama substantially copied the constitutional provision of West Virginia above quoted, as did Colorado in 1876, and as did Georgia in 1877 in meaning, though not in terms.

Several States legislated as to "continuous lines." See Code of Alabama, 1886, vol. 1, § 1586, page 389. Connecticut gave railroads authority to consolidate with others in or out of the State to form "one continuous line of railroad." Acts of 1883, § 1, laws, page 267. Dakota authorized her roads "to constitute one continuous main line." Code of 1883, § 4773, page 830. In 1881 Georgia had passed a statute almost in the words of that of Connecticut above quoted. See Georgia Acts of 1881, § XV, page 165. Indiana allowed consolidation of railroads "in the continuous line." Rev. Statuets, Ill., 1888, § 3951. Kansas had so legislated as to "a continuous line." Compiled laws, 1885, § 5221, page 778, and § 5222, page 779. Michigan so used "continuous line." Howell's Am. St., 1882, § 3343, page

854. So in Ohio, Rev. St. 1884, § 3300, page 674, and act of 1885, Laws, 150, and so in South Carolina. General Statutes, 1882, § 1425, page 416.

In Congress these prohibitions had a growth illustrative of their meaning. See Acts 1862, vol. 12, p. 321, vol- 18, p. 112, and Acts of 1866, covered by R. S. §5258.

On December 11, 1878, Mr. Reagan, from the Committee on Commerce, reported a bill as a substitute for a previous bill by that committee on this subject, which latter bill passed the House, but not the Senate. Its section 4 forbade a greater charge "for a shorter than for a longer distance in one continuous carriage." (McPherson's Hand Book, 1880, p. 70.) The bill from that same committee, reported in February, 1880, had no "long and short haul clause," but required reasonable rates from all companies, etc., "operating a line or lines of railroad." (McPherson's Hand Book, 1882, p. 125)

In the bill of that committee reported on the 8th of January, 1885, the fourth section required all compensation over all lines to be not greater "for a shorter than for a longer distance which includes the shorter on any road or pipe line, and the railroad or pipe line shall include all the railroad or pipe line in use by such corporation, whether owned or operated by it under a contract, agreement, or lease by such corporation." (McPherson's Hand Book, 1884, p. 10.)

In the Senate Mr. Beck proposed to substitute for the words, viz., "for shorter than for a longer distance, which includes the shorter," the words, "in any distance less than the whole length of the line, than it charged for a similar service for the whole length of the line" (*Ib.* 19.)

Mr. Hoar moved to insert the words "in proportion" between "line" and "than."

Mr. Plumb moved to amend Beck's amendment by adding to the inserted words, "under similar conditions and circumstances." Agreed to; 26 yeas, 20 nays (*Ib.*, 20). Beck's amendment rejected then. Yeas, 6; nays, 41.

Senate substituted Cullom's bill (*Ib.*, 22, p. 54), "under substantially similar circumstances and conditions" as to

rebates, drawbacks, and other "devices," and "under substantially similar circumstances" (no long and short haul clause). Senate passed it; 43 yeas to nays 12. Not taken up again in House because of objection (*Ib.*, 25).

On previous vote in Senate "a shorter distance than for a longer distance over the same line of road and in the same direction," but this proviso shall not be construed to legalize the charge as much for a shorter as for a longer distance, in any case. Rejected. (*Ib.*, 25.)

Forty-ninth Congress, 1886, May 5, Cullom's bill, section 4, "in the aggregate * * * for a shorter than for a longer distance over the same line, in the same direction, and from the same original point of departure" allowing exception by Commission for water competition "in such special cases." On Senator Camden's motion "from same original point of departure" stricken out. (McPherson, 1886, p. 136.) Amendment "under a common control, management, or arrangement" was agreed to.

Senator Camden inserted "of like kind of property under substantially similar circumstances and conditions." (Sec. 4, *Ib.*, 138.)

Edmunds's amendment carried, etc., "from same point of departure or to same point of arrival." (*Ib.*, 138.) Lost 23, 24. (See the bill, *Ib.*, 138, 139.)

H. R. Reagan, Committtee on Commerce, May 22, 1886 (*Ib.*, 144, sec. 4), "for a shorter than for a longer distance, which includes the shorter distance on any one railroad." July 30, substitute for Senate bill. *Ib.*, 233 (134 to 104). (See House bill, 1880, pp. 70–72.)

It may be well to recall that this Court, in October, 1886, in the Wabash case, 118 U. S. R., 557, said continuous transportation was under National Jurisdiction. The foundation was laid by the Court in Munn's case. 94 U. S. R., 113 and other cases in that volume on pp. 155–164.

It appears, therefore, that these terms in the interstate commerce act were not made to meet the practice and nomenclature of railroad experts, but to abolish or at least modify them.

Gen. E. P. Alexander, examined on behalf of the railroads, was asked "whether or not the phrase, 'under substantially similar circumstances and conditions,' as connected with the railroad transportation of passengers and

property in the United States, was at and prior to February 4, 1887, a railroad traffic term." The answer was: "The phrase quoted has a history. It came into use in 1886, during the discussion preceding the passage of the Interstate Commerce Commission act. During that discussion this phrase was crystallized in its present shape, and became what might be called a household word, replacing several more colloquial but less exact expressions, such as 'under similar circumstances,' 'under like conditions,' etc., by introducing the qualifying adverb, 'substantially,' which had been generally understood, but not expressed in off-hand discussions."

He further said that the phrase "under substantially similar circumstances and conditions" was at that date, February 4, 1887, being the date of approval of the interstate commerce act, understood "by those engaged in the traffic department of the railroad service of the United States had the same meanings they bore in the old, and were universally understood to refer to those circumstances and conditions which cut a figure in rate making, or, as I might call them, those conditions which are rate controlling. These rate controlling conditions are generally recognized as cost of service and value of service and character of competition, though the latter condition is but one phrase of the second. Substituting, therefore, in the phrase in its present shape the equivalent expressions, the meaning of the phrase may be stated as 'identity of cost of service and value of service, considering character of competition.'" (See Rec., pp. 109, 110.)

The same question was put to Mr. Fink, of Louisville, Ky., at page 118; to Mr. Smith, of Louisville, Ky., at page 125; to Mr. Goddard, of New York, at page 132; to Mr. Newman, of Chicago, at page 135; to Mr. Murray, of Cincinnati, at page 166; to Mr. Sol. Haas, of Atlanta, at page 188; to Mr. Fitzgerald, of Knoxville, at page 271; to Mr. Stubbs, of San Francisco, at pages 140 and 500, and they all answered as Alexander had as to the origin of the phrase, except that they all made it originate with the act instead of in the discussions preceding the act of February 4, 1887. Mr. Fink mentioned that the phrase "under the same circumstances" was in the English railway clauses

consolidation act of 1845, and the phrase "under like circumstances" was in the English regulation of railways act of 1868. No one witness pretends that the said phrase in the act was ever a practical phrase until Congress so made it.

It is plain, therefore, railroad experts being witnesses on behalf of the railroads, that they have demonstrated in this case that Congress, in the passage of the interstate commerce act of 1887, deliberately laid aside the expressions that had been used in English legislation and supposed equivalents that were in use in the United States and for itself adopted an entirely new phrase in words. The *prima facie* presumption, therefore, would be that Congress did not intend that thereafter what had been considered proper by railroad men should be proper under this new legislation. And yet more than one of these witnesses testifies that these railroad companies have made no change on the subject of the long and short haul clause in their conduct since the passage of the act from what it was before, because they understood Congress not to have changed the law.

We have shown what Mr. Alexander, at pages 109 and 110, thought was embraced by the phrase used in the act of 1887. A slight reference to other testimony in the case will show that while other railroad men embraced all that he did in his answer they all covered more, and no two of them agree. For instance, to the two constituents mentioned by Mr. Alexander, Mr. Newman, at page 136, adds "character and quantity of the traffic to be moved, geographical situation with respect to competition between carriers and competing markets, the kind of equipment to be provided, manner of handling, as to speed of trains," as some of the many things to be considered. (See also pages 140, 141.) At page 257 Mr. Haas adds "competition of product and products," though he leaves out all the others except "cost of service" and "competition between carriers and between markets."

Mr. Fitzgerald, at pages 316 and 317, in answer to the question, "State briefly what are the circumstances and conditions which substantially affect the transportation of property by railroads or other carriers," answered, "They

are varied, and so far reaching that it would be difficult to give them in a brief answer. The carrier must consider, first, "the sum of money invested in the construction of the road," and to that he adds sixteen other considerations, most of which are not mentioned by the other witnesses. Mr. Blanchard, at pages 462 and 463, introduces "sparseness of population" and "new methods and tariffs"

Without stopping to inquire whether there are not other parts of the testimony which substantially allude to this matter, and make additional variations and disagreements between the witnesses, it is clear that even railroad experts differ so widely in their opinions as to what did enter into the consideration of the propriety of the long and short haul clause, that it was highly proper that Congress should have thrown aside their verbiage and enacted a direct law to control the confused administration of the railroad service of the country.

Should the court wish further to examine the testimony, the following pages may be cited as to how far the value of service should be considered, to wit: Alexander, at page 115; Smith, at page 126; Peck, at page 173; Haas, at pages 189, 190, 194, 196; McGovern, at page 240; Marsh, of Augusta, Ga., at page 422; and Newman, at page 495. See, also, pages 121, 166, 197, 201, 207, 210, 213, 217, 240, 381, 421, 431, 463, 466, and 478, both as to the cost of service, and as to the cost plus the value of service, as given by the different railroad experts.

V.

"LINE."

THE MEANING OF THE WORD "LINE" AS FOUND IN THE FOURTH SECTION OF THE INTERSTATE COMMERCE ACT.

We claim that the transportation from Cincinnati to Social Circle, Augusta, and Atlanta, was on "the same line."

It is indisputable that the traffic in question was a through traffic from Cincinnati to Social Circle and from Cincinnati to Augusta. It is not disputed that the traffic passed over the same tracks in each case. It is not disputed that the traffic went on through bills of lading to each of the places

and by a continuous carriage, and that each road concerned in it took its part of the gross amount earned in conformity with what they had agreed upon, whether it be called a mileage proportion or a local rate. This clearly made a "*common arrangement*" within the meaning of the Act of Congress of 1887, the Interstate Commerce Act.

The respondents contend, however, that the "line" was, nevertheless, different; that it was one line to Atlanta, another line to Social Circle, and another to Augusta, and, that, therefore, the acts complained of were not within the statute.

It is important to consider carefully what the interstate commerce act means by the word "line" in the "long and short haul clause." The act of 1887 made for itself certain definitions. By its first section it was to apply "to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are *used* under a common control, management, or arrangement for the continuous carriage or shipment from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia," etc.

And in the same section it enacted that—

The term "railroad," as used in this act, shall include all bridges or ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage.

In the third section the words "their respective lines," and "their several lines," and "between such connecting lines," from the context plainly mean the individual lines of each road or corporation making up a through line or system.

The fourth section declares that—

"It shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance *over the same line*, in the same direction, the shorter being included within the longer distance."

The sixth section declares that every common carrier subject to the provisions of the act shall file with the Commission schedules of rates, fares, and charges, established and published in compliance with this section, and notify the Commission thereof.

It further requires that—

"Every such common carrier shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of the act to which it may be a party. And in cases where passengers and freight pass over *continuous lines or routes operated by more than one common carrier*, and the several common carriers operating *such lines or routes esiablished joint tariffs of rates*, or fares, or charges, *for such continuous lines or routes*, copies of such joint tariffs shall also, in like manner, be filed with said Commission. Such joint rates, fares, and charges on *such continuous lines*, so filed as aforesaid, shall be made public by such common carriers, when directed by said Commission, etc.

Section 7 declared that—

It shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being *continuous from* the place of shipment *to* the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as *one continuous carriage* from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for *some necessary* purpose, and without any intent to avoid or unnecessarily interrupt *such continuous* carriage, or to evade any of the provisions of this act.

For nearly a generation the expression "continuous lines for transportation" had stood upon the statute books of the United States. See *Act of July* 1, 1862 (Stat. L., vol 12, p. 331; vol. 18, p. 112), and the *Act of June* 15, 1866 (Stat. L., vol. 14, p. 66), as covered by section 5258 of the Revised

Statutes. In 1873 the Supreme Court of the United States, in *Raildroad Company* v. *Richmond et al.* (19 Wall., 584), had held that that *Act of June* 15, 1866, and another of *July* 25, 1866 (Stat. L., vol. 14, p. 219, Rev. Stat. sec. 259), "were designed to remove trammels upon transportation between different States interposed by State enactments or by existing laws of Congress," etc.

And so in 1887 and 1889, when dealing with interstate commerce and creating the Commission, etc., the United States in the exercise of its constitutional power to regulate commerce among the several States,used the same expression of "*continuons lines*" to mean *physical things*, over which arrangement is made for through transportation of passengers or merchandise. The railroads interested in this litigation did form such a system. They themselves so understood, as appears by the testimony. See how the words "line" and "system" are used in the following pages in their evidence, 220, 221, 222, 324, 350, 351, 393, 455, 456, 457, and 498,as well as in their answers. * * * * *

To show that these railroad companies were all under one control and management, an arrangement within the true meaning of the act, it is only necessary to note that their schedules of freight and rates were made absolutely and without qualification or limitation by their common agent for that purpose, the Southern Steamship Association. (See pp. 66, 222, 269. 280,, 293, 294, 341, 346, 348, 399, 492 484, and 498.)

The evidence shows that prior to this controversy buggies shipped by the complainant by these companies from Cincinnati to Social Circle had been billed on through bills of lading, and that practice was only stopped, if stopped at all, by a request from the Georgia Railroad Company, dated July 4, 1891, found on page 402 of she record *after* the decision of the Commission on the fourth clause.

Whether, therefore, the word "line" be applied to the individual road, or whether the word "line" shall be applied to the whole system of combined roads, defendants herein, from Cincinnati, Ohio, to Augusta, Ga, the fourth clause, known as the "long and short haul clause" has been violated in this case by the charge of $1.37 to Social

Circle, whereas over the same line at the grater distance to Augusta only $1.00 is charged for the same service.

The mere form of a bill of lading, the mere agreement that the through rate shall apply only to goods shipped to Augusta, and not to goods shipped to any of its local stations, is only a "device" to escape the requirements of the act. The freight being transported was interstate commerce. The evidence shows no reason, apart from competition, which will be discussed hereafter, why Social Circle, being part of the same line in the same direction, should pay such excess of charges over the rate to Augusta.

The truth of the case is that from Cincinnatti to Augusta the through contract for carriage constituted them but one line. Their schedules and the Southern Steamship Association's regulations filed in the office of the Commission at Washington (and which are in this record, p. 341) show that they were but one line from Cincinnatti to Augusta. Any other construction than that for which we contend would allow each individual road to vary by its individual contract or request the meaning of the law as applied to it, or at least would allow the termini of all roads to be made preferred places in all matters of transportation, which preference is forbidden by the interstate commerce legislation.

Judge Newman's second head-note decides practically that railroad companies may make the law apply to their several parts as they please by merely varying their contracts to suit themselves. For that he relies upon the *Chicago and Northwestern Railroad Company* v. *Osborne*, and *Same* v. *Junod* (52 Fed. Rep., 912), decided October 17, 1892, before Brewer, Cir. J., the first head-note of which is as follows:

" Where two railroad companies owning connecting lines of road unite in a joint through tariff, they form for the connected roads a new and independent line, and the through tariff on the joint line is not the standard by which the separate tariff of either company is to be measured in determining whether such separate tariff violates act February 4, 1887, section 4, which forbids greater compensation for a shorter than for a longer haul. (48 Fed. Rep , 49, reversed.)

That decision, in 52 Fed. R., was made under the old act of 1887, before it was amended. In the body of the decision the judge said:

Neither company is bound to adjust its own local tariff to suit the other, nor compellable to make a joint tariff with it. It may insist upon charging its local rates for all transportation over its line. If, therefore, the two companies by agreement make a joint tariff over their lines, or any parts of their lines, such joint tariff is not the basis by which the reasonableness of the local tariff is determined. (*Ib.* p. 914.)

And again, on page 915, he said:

When the two companies, by their joint tariff, make *a new and independent line that new and independent line* may become subject to the long and short haul clause. But what we mean to decide is that a through tariff on a *joint line* is not the standard by which the separate tariff of either company is to be measured or condemned.

And again, on the same page, he said:

"The whole matter is left to the voluntary action of the companies, and in forming, by agreement, any joint tariff the basis of division and the proportion of moneys each shall take is also a matter left to their determination. The denunciation of the fourth section is against each separate common carrier for its violation of the "long and short haul" clause on its own line."

"And again, on the next page, he said that those participating in the debates in Congress said "that the line formed under the joint tariff of connecting companies was one separate and independent from that of either of the connecting companies," etc., and was true only when applied to interstate commerce.

Speeches in legislative bodies are not legal evidence of what the laws there made mean.

The only just and persuasive influence as to the meaning of the law developed by the legislative history of this act must be found in the report of the conference committee, when the whole matter had been finally agreed upon, ex-

plaining the situation and the then understanding of the meaning of the added Senate amendments, upon which the Senate had acted as a body and upon which both Houses agreed. That report, so far as concerns the fourth section of the act, is as follows:

"The fourth section adopts substantially the provisions of the House bill on the long and short haul, with the following proviso: That upon application to the Commission appointed under the provisions of this act such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for a longer than for a shorter distance for the transportation of passengers and property, and that the Commission may from time to time prescribe the extent to which such common carrier may be relieved from the operation of this section."

While we differ with the judge as to what makes a "line" under the fourth section, certainly there is nothing in that opinion that declares that by a series of contracts affecting interstate commerce, carriers thereof may make just such a line or as many lines as is agreeable to them; and yet that is necessary to sustain the opinion in this case.

It is impossible to make the word "line" in the statute mean an idea or arrangement merely—a thing of contract or policy.

The definition of the word "line," so far as it can possibly relate in the subject, is found under the eighth and ninth heads in the Century Dictionary, as follows: "8. A *series* of public conveyances, as coaches, steamers, packets, and the like, passing to and fro between places with regularity; as, a *line* of ships to New Zealand; the Cunard *line*. 9. A railroad, or a continuous part of a railroad; as, a main *line*, branch *line*, through *line*." And in Webster, under head 13, "line" is defined thus: "A *connected series* of public conveyances, as a *line* of stages or steamers; and hence, an established *arrangement* for forwarding merchandise, as an express *line*."

The idea of a statutory line, as named in the Acts of Congress, being anything other than a continuous physical thing, whether produced or controlled by one company or a hundred, is absurd. The statute indisputably refers to the movement of physical things over physical tracks of railways, so that whether a line may come into exist-

ence by the conventional arrangements between different parties or not, it comes at last to the physical fact, and nothing else, for freight and passengers can move over nothing else.

It is true, as Mr. Justice Brewer said in the Osborne case, that one railway company may grant to another trackage rights, and that in such case there might be two lines over the same track; but both would be physical movements of physical things over a physical line, which physical line would be the same, just as two coaching establishments might run over the same turnpike. But no such state of things is pretended to exist or to have existed in any railway operations in the country, and such a state of things is really impossible in view of regard to safety of administration. It is confidently asserted that no such two lines over the same track have ever existed. We think it plain, therefore, that the statute in using the terms "over the same line," describes, and describes exclusively, the actual track or route in respect of which one or more railway companies have arranged to conduct interstate commerce.

We repeat the fundamental and indisputable proposition, that the subject of interstate commerce is not the various railways of the several States, but that it is the commodities and passengers that are to pass from State to State under any arrangement which the different State railways may choose to make for the continuous movement of persons and property. The line, therefore, and the respective lines, as used in the act of Congress, were the tracks or routes (which mean the same thing) over which interstate commerce should go. See Justice Brewer's opinion in this court in C. C. C. and St. L. R'y Co. *vs.* Backus, 154 U. S. R., 439.

Without such a construction it would be impossible for Congress to regulate interstate commerce at all, for, aside from two or three corporations chartered by Congress, there are no railways, and there can be none, that have any existence as one corporation in more than one State, for a State can make no extra territorial corporations.

It follows, therefore, that it is impossible, consistently with the regulation of interstate commerce, that railways in different States can make by convention between themselves different lines from point to point over their same

tracks of communication and intercommunication so as to be able to entirely defeat the clear intent and purpose of the fourth section of the interstate commerce act.

The third, fourth, fifth, sixth, seventh, and eighth headnotes by Judge Newman are founded upon the same decision in 52 Fed. Rep. and the Kentucky Bridge case in 31 Fed. Rep., and on the case of Louisville and Missouri River Railroad *v.* St. Louis, Iron Mountain and Southern Railroad in 41 Fed. Rep., 563.

This last case was decided by Judge Caldwell in the circuit court of Arkansas on March 20, 1890, and all decided by it is embraced in the following headnote: "A court of equity has no power, either at common law or under the interstate commerce act, to *compel* a railroad company to enter into a contract with another company for a joint through rate and a joint through routing of freight and passengers." (*See* 41 Fed. Rep., 559.) At page 563 it was said: "No discrimination against the traffic carried on by the plaintiff over its own line is claimed." It will be seen that there is no similarity between the case at bar and that case.

Under the ninth headnote Judge Newman also cited *United States v. Mellen et al.* (53 Fed. Rep., 229), which was an indictment. The first headnote was as follows:

"The long and short haul clause of the interstate commerce act (section 4) does not apply to a case where the short-haul rate is the combined local rates of two connecting lines, and the lower long-haul rate is a joint rate made by the two lines acting together, and an indictment alleging such rates is bad. *Railway Company v. Osborne* (52 Fed. Rep., 912) followed."

The second headnote is as follows:

"An indictment alleging that the share of a joint rate taken by one company is less than its local rate for a shorter haul, etc., is bad. *Railway Company v. Osborne* (52 Fed. Rep., 912) followed."

The decision is based *wholly* upon the idea that section 4 "applies to each separate common carrier for its violation of the long and short haul clause on its own line." (*Ib.*, 231.)

Even if that were true, the decision in this case would be wrong because the Georgia Railroad did take on its line more for the short haul than for the long haul. Under the evidence, there was absolutely no difference between the shipments of buggies from Cincinnati to Augusta and Cincinnati to Social Circle over these combined roads making a through line, except that they alleged that there was no contract for a through line to Social Circle. See evidence as to contract, at the pages cited above.

When the interstate commerce act was passed, or, rather, in 1886, just before its passage, there were 33,694 railroad stations in the United States. Of those only 2,778 were at junctions of one railroad with another. (See statistics from the Bureau of Statistics, Congressional Record, Vol. 13, p. 562.) On the theory of Judge Newman, railroads can make with each other as many separate contracts as to joint interstate freights as they have local stations. Each contract makes a new line if the contracts govern. This application of figures for illustration demonstrates the wrong in the decision.

VI.

CONCLUSION.

SUBSTANTIALLY SIMILAR CIRCUMSTANCES AND CONDITIONS.

In a preceding portion of this brief it has been shown that the witnesses failed to prove that these words had a technical, understood meaning at the time of the passage of the act; it was not within the province of these witnesses to attempt to inject into the case their individual opinions as to what the words legally mean. Such testimony was not admissible; there are, however, certain decisions of some of the courts on this subject.

But we insist, notwithstanding whatever may have been said or decided heretofore, that the true and clear meaning of the fourth section of the Interstate Commerce Act is first, that the phrase "under substantially similar circumstances and conditions" applies only to physical conditions belonging to and inherent in the very act of transportation, and that it does not embrace any extraneous coniderations, whether of competition or policy, whatever. The fundamental and complete description of the subject of the sec-

tion is "*transportation*." It follows, therefore, grammatically, as well as sensibly, that the *circumstances and conditions relate to the act of transportation, and nothing else.* That it relates to distance, also, of the same sort of transportation is equally clear. And, to make it clear that this section was to stand independent of all others which relate to unreasonable charges and undue preferences, etc., it was provided in the same enacting clause that the limitations so imposed against the greater charges for the shorter distance should not authorize the carrier to receive even as great compensation for the shorter as for the longer distance, thus leaving that part of the subject to fall within the other sections of the Act relating to unreasonable charges and unfair preferences.

This enactment made a hard and fast rule that it might be supposed could not be misunderstood. But, in order to equitably relieve against this rule in cases of special hardship that might fall within it, the proviso is added that upon application to the Commission the carrier might, in special cases, after investigation, be authorized to charge less for the longer than for the shorter distance, and that the Commission might, from time to time, designate the extent to which the carrier should be relieved from the operation of "this section" of the Act. If this be not the true meaning of the section, the proviso is altogether useless, and can have no application in any possible instance; for if the words "under substantially similar circumstances and conditions" are to be taken as referring to all questions of competition, policy, and combination embracing every relation of trade, not only as to routes, but as to places of production and places of sale, there would be no case whatever in which it would be necessary for the carrier to apply to the Commission.

Under the enacting clause of the section his rights and duties are absolutely fixed, and if those rights and duties are to be measured by considerations extraneous to the act of transportation under circumstances which relate to the transportation as such, he may determine whether he will charge more for the short than the long haul without any possible liability or risk so far as the fourth section is concerned. But if, on the other hand, the language of the fourth section is given its plain and obvious meaning, and confined to the same kind of transportation, physically considered, the whole section can operate fairly and justly.

Without this construction the whole section has absolutely no force or meaning whatever, for on the opposite construction its theory is entirely covered by the provisions of the second and third sections. We think it obvious, therefore, that the fourth section was intended to be, as it reads, a provision against any charge of a greater sum for a shorter distance under circumstances that related to the act of carriage alone, together with the relieving clause which might be applied in the discretion of the Commission alone, on due application therefor.

This construction makes the whole Act entirely harmonious, and gives to every part of it a complete and effective meaning. The second section provided for equality for similar service which would not necessarily cover the long and short haul subject; and the third section similarly provided against unfair preferences to persons, localities, etc., which would not necessarily exclude a greater charge for a smaller service. Then the fourth section completed the legislative intent of public security and fair play by providing definitely against a greater charge for a smaller service in respect of distance; and in order to provide for possible cases that on investigation by the Commission might appear to warrant a relief against the enacting provision of the fourth section, the proviso was inserted giving the Commision authority "in special cases after investigation" to relieve the carrie from this prohibition. Thus and thus only can all the provisions of the act be given their due and plain force.

It may be said that the Commission itself has taken a different view of the statute. This may or may not be true, but whether true or not, it is the whole body of the people of the United States who are concerned in this litigation; and they are entitled to the unbiased judgment of the final courts of law upon the meaning of the statutes their representatives have enacted, whatever may have been the errors of a particular Executive branch of the Government in their construction.

But the Interstate Commerce Commission has not in substance given a different construction to the section. It has only considered questions arising under the fourth section in one or two instances when the carrier had undertaken to act in advance of the attention of the Commission being called to the subject.

In this view of the true effect of the fourth section the action of the Commission, although taken without a previous application for relief by the carrier, was conclusive. This is not in opposition to the provision of the statute that their report, etc., should be *prima facie* evidence in the courts of law, but it is upon the ground that the carriers have violated the fourth section of the act in the undisputed fact of their charging more for a short than for a long haul when the circumstances connected with the transportation, as such, were precisely the same; and, therefore, the order of the Commission requiring a rectification thereof was, of course, clearly right however much it may be contended the evidence tends to show that a competition of market and lines and other matter of policy would relieve a carrier from an imputation of violating the second and third sections, and also because it is manifest that, if our construction of the fourth section be correct, the railways can not depart from its requirements without the approval of the Commission; and that approval is, in respect of the fourth section, evidently absolutely final.

But if it shall be held that we are wrong in the views above expressed, touching the fourth section of the act, and that the matter of similar circumstances and conditions is one at large embracing all considerations of interest and policy that may exist among carriers and between places of production and sale, etc., it would seem to follow that every carrier, whether in combination or competition with others, would be free from any of these sections of the act, for there can hardly ever be a similarity of circumstances and conditions measured by such standards in respect of any transportation whatever. Even in respect of traffic between the very same places, there may be dissimilar circumstances and conditions as regards the various enterprises of the people engaged in business at the two places, and, of course, it need not be said that as it regards transportation, not between the same places, any comparison is always dissimilar in its extraneous circumstances and conditions. To put such a construction upon the act, which is the necessary logic of the defense, is, beyond dispute, to absolutely render the whole provision of the act of Congress nugatory.

Whatever some judges here and there over the country may have said or decided in respect of such questions, we

hope that it is not true in this country, as Lord Chief Justice Coleridge said in a deliberate and written address recently delivered in England, that there has been or can be a "desperate struggle made by some of our judges to render remedial statutes nugatory." On the contrary, we venture to believe that it is the high and best mission of the judiciary of the United States to render remedial statutes, like the one in question, effective and beneficial by the largest interpretation in favor of the public that their words will warrant. Measured by such standards as we have invoked, there is an end of the defense viewed in the light of any section of the statute.

Again, we insist that the clear result of all the testimony is that, from even all the carriers' points of claim, the difference between the rate from Cincinnati to Social Circle and that to Augusta was entirely unjustifiable. It appears from the testimony of one or more of the railway witnesses that the rate from Cincinnati to Augusta was a reasonable rate and furnished a profit to the carrier. If that be so, it necessarily follows that the excessive rate from Cincinnati to Social Circle, being more than thirty per cent. in excess of the rate to Augusta for a distance 119 miles less, cannot be defended upon even any railway aspect. The suggestions strenuously advanced on the other side in the course of the testimony of these carriers that they will not make so much money if they reduce their rates to Social Circle need only be stated to condemn it. It is precisely this unfair and unjust exaction out of which the carrier is to make profit at the expense of the customer that has led to these proceedings. The redress of every extortion diminishes the fund of the extortioner.

It may be well in this connection to suggest that the rates at issue are a good illustration of unduly high freight charges, *maintained by combination*, rather than of low rates compelled by competition.

Mr. Howard K James, the president of the company which was the complainant before the Commission, annexes to his deposition a map covering the territory in question, from which it appears that the rates from Cincinnati to Atlanta were greater than to any other place within the area circumscribed by a circle having it center at Cincinnati drawn upon a radius of the distance to Atlanta.

The fact that the rates to these points in Georgia are unjust and unreasonable in themselves is shown very conclusively from the testimony of Mr. Stahlman, chairman of the Southwestern Steamship and Railway Association.

He testified (direct interrogatory 40, p. 311, and in cross interrogatories 19, *et seq.*) the complaints of shippers, boards of trade, and others commercially interested have been "continuous and vigorous," so much so "that the railroad managers and members of the rate committee (of the association) have become almost convinced, *many of them entirely so*, that the rates of transportation from Cincinnati to Augusta and other points in this territory *ought to be reduced rather than advanced.*"

It is interesting to note how it happens that these railway managers are unable to carry into effect a reduction of rates which they believe a proper administration of the property they control, or rather ostensibly control, requires. The reason why this result has not happened is because, through the medium of the Southern Railway and Steamship Association, they have surrendered to that combination for the purpose of maintaining rates not only the right to make the rates in the first instance, but have attempted to deprive themselves of the right to reduce them after they have become established, and this is made practically effective by the agreements contained in the first and second sections of Article XXIII. of the agreement under which that association is formed.

Section 1 provides that—

Whenever rates have been fixed, * * * there shall be no reduction from such rates without the consent of the Commissioner.

To prevent the exercise of control in this direction by the officers of one road without the concurrence of all the others, and to require all roads not members of the association to adhere to the rates fixed by it, Section 2 of that article provides, after reciting that the maintenance of rates is of the very essence of the agreement, and containing a pledge of all the parties that they will maintain the rates, for a boycott of all companies not members of the association by a promise that each will enforce against such recalcitrant road "increase of proportions" and "full local rates."

In other words, the case presents a situation where those persons who are intrusted with the management of the dif-

ferent railroads in this section, from their own association with the business of their roads, after long continued and vigorous protests, have individually come to the conclusion that the rates are excessive and ought to be reduced, are powerless to put their conclusions into practice, because to do so involves their retirement from the traffic association, and this they cannot do for fear of "increase of proportions" and "full local rates."

Therefore it is that the lines which are testified to as so many avenues of traffic from Cincinnati to the different points in this territory do not exist as independent competitive factors in the railroad question; through the medium of this association competition has been neutralized as effectually as if all the the railroads were the property of one company; a fair adjustment of the freight rates to coincide with the conclusions of the managers of the several component parts of the association is prevented, and the result is what might be expected, the imposition of an arbitrary, unjust, and oppressive burden, in the way of rates which recognize no rule but that of "what the traffic will bear."

The plain and unmistakable principle imbedded in the fourth section of the act to regulate commerce is that railroads shall not make rates greater for any intermediate point than for the terminal, and such a rate, if shown diagrammatically, ought to be correctly represented by an unbroken straight line, and wherever the rates are based upon cost of service, necessarily such a line rises proportionately to distance. The situation between Cincinnati and these points in Georgia is shown by the diagram annexed to our other brief in this case.

And, as illustrating the effect upon different places on the same line by this so-called competition, but real combination, between the carries as applied to service and mileage and their respective gains thereby, the diagram No. 2 is submitted and annexed to that brief.

Our opponents say there are certain differences that the courts of the United States have recognized; that the statute recognizes three: First that we have recognized that the law does not apply to competition between roads in the United States and Canadian roads, which are foreign; and between roads that are interstate, crossing State lines, and roads like the New York Central or the Georgia Railroad, and others that may be named, which are wholly within

one State; and that it does not apply to competition with water routes.

And one of the briefs asks, what is the difference between competition of all rail carriers here and competition by those three kinds? Doubtless each is competition, but competition only does not give the reason. Why shall we not hold our railroads down to those others? Why not down to that against Canadian roads? Simply because Congress cannot control the Canadian roads. The same is true as to interstate roads. Then the restrained lines would be under the power of those over whom Congress has no control.

In the Canadian difficulty we might give the additional reason that those roads are foreign. In England there are certain cases where they allowed discrimination for home trade against foreign trade. We have allowed it ever since we have been a government. For instance, we allowed less revenue paid on tea, etc., shipped on board the vessels of the United States than on foreign bottoms, to encourage the building of a navy, etc. For general governmental purposes a discrimination was often made as between home and foreign vessels.

Then they say, why the exception in favor of water? What is a railroad, and what is water? Everybody knows that they are as absolutely different as almost any things that can be named. A railroad is a thing on land, made, laid and kept in repair by the wage-earning sweat of human muscle and nothing else. The way in the water is cut by the keel and closes behind the vessel. God made it and God repairs it; it is free for all mankind. A railway is a thing whose place is fixed by law. No man may run on it but the owner of the charter. The sea is wholly free for every vessel. The ship is all that costs anything. Its line is not between termini fixed as Cincinnati and Augusta, or between any points, but may be extended as widely of the courage as the navigator may desire. Everywhere is its way, everywhere is its place.

Again, the law gives to the ship, except national protection, no privileges of trade except such as are necessary for the public revenue, as a rule. The railroad gets exclusive rights. It is given the right of eminent domain; the right of monopoly; all those things are guaranteed to it by statutes, and that monopoly, etc., is the very reason given by

the English cases why all the cases quoted on the subject of common carriers at common law do not apply to railroads. They say, having received all these special things from the government, the railroads owe to the government reciprocal duties. That was the very basis at which our Supreme Court started in 1877 in Munn's case. They said, States may regulate the tariffs in their elevators, because it was like licensing a man to sell beer or to sell bread in England. The law could fix how much beer he should put in a pot and how much his bread should weigh. The privilege given made him *quasi* public in his relations with the public. That allowed the public to put on him restrictions, that is all.

They can find cases where courts have held we cannot compel a railroad company to come into interstate traffic. That is all right. Congress, perhaps, said to the Georgia Railroad, it may stay out if it wished, but if it undertook to become a carrier for *continuous traffic* from one State to another, if it accepted that privilege, it must obey this law.

VII.

Below were certain minor contentions which need some notice.

Under the heading VI., page 7, of Mr. Baxter's brief below, he commented on reducing the rate to $1.00 *on the testimony of a single witness.* That witness was C. C. Harvey, Vice-President of the Cincinnati, New Orleans and Texas Pacific Railroad Company, defendant, who was a witness of and called by the defendants, and who testified that he was in charge of traffic arrangements, and that the General Freight Agent and Passenger and Ticket Agent reported to him directly; that rates made by them were subject to his supervision; that he had been in the railroad service for twenty-six years, and had had a great deal to do with rates during the whole of that time. In fact, his testimony was in the nature of an admission by at least one of the defendants.

It is a notable fact that the rate from the East to Atlanta was the same as from the West to Augusta, thus cutting Social Circle both ways.

Almost all the witnesses were either officers of defendant or employees of the railroad companies.

On page 114, sixth clause, Mr. Baxter says the competing line in that case was 172 miles longer. The Commission there only expressed a doubt. *In Re.* L. & N. R. R. Co., 1st *In* C. C. R. 83. The same roads competing with defendants from Cincinnati to Atlanta can also compete to Social Circle over the Georgia road.

Page 127, sixth clause. If the Augusta rate is reasonably remunerative, the same rate to Social Circle would certainly be excessive.

Page 128, under heading XLVII. The Commission has never held that mere competition between "carrier and carrier" makes out the dissimilar circumstances, etc.

Page 134, under heading L. It is the universal practice to make through rates lower than combination rates, etc.

Page 136, last paragraph. By what sort of "blasphemy" did the railroads without any "act of God" put Atlanta ahead of Social Circle on freights coming from the *East?* This question answers the suggestion on page 137.

Page 138, sixth paragraph. About freight being carried from Cincinnati over the trunk lines, thence by ocean, etc., to Savannah and Augusta, seems to us not true in fact. It seems simply another "can be," but never existing in practice.

Page 140. Augusta's population grew nearly 40,000 because it had good rates.

Page 143, first paragraph. The statement we submit is not true, according to our information.

Page 145, third paragraph. If 28.4 cents is fairly remunerative for the Georgia road on Augusta freight, then 30 must be excessive for it for Social Circle freight.

Page 149, second paragraph, puts aside the fact that the carriage to both Social Circle and Augusta was less than car-loads.

Page 150, last clause. It occurs to us to ask in this connection if the freight billed from Cincinnati to Social Circle had been lost between Atlanta and Social Circle, who would have paid for it?

We suppose that really what is in this case may be found on page 144, sixth clause, which, in substance, means that what the railroad people call *competitive traffic*, no matter in consequence of what facts it is competitive, makes the dissimilar circumstances, etc. That would utterly destroy the fourth section. Indeed, they practically say that section is

a nullity, worse, a farce. But say our construction of the fourth section—that it is absolute and can be got rid of not otherwise than by order of the Commission—is not tenable. And suppose the court gives weight to some former rulings of the Interstate Commerce Commission on this point. Its view was that the water track had been laid without cost to anybody, and that anybody could put crafts or boats on and carry at cheaper rates than was possible for rail carriers; that, therefore, carriers by water could dictate and force terms upon rail carriers. Hence, that sort of competition was recognized by the Commission as creating dissimilar conditions. On the other hand, railroads were built and maintained at about the same cost, and, therefere, one was in no condition to dictate terms to another. What one could do, the other could defend itself at the same cost.

The law-making power did not contemplate, and the Commission could not and would not contemplate, that any road would establish rates or carry at a ruinous rate, or at less than a reasonable rate, and, therefore, the act did not provide that other roads might meet such ruinous rate which must necessarily destroy the property unless made up in charges at other points.

If such considerations of former opinions have weight, it is well to mention that when the law was first passed, our profession gave it the construction we now put upon the fourth section in our arguments in this cause. Smith, the Vice-President of the Louisville and Nashville Railroad, now a party to this proceeding, and who was a witness, made application to the Commission for a suspension within the next few days after the law was enacted and the Commission was appointed. Mr. Baxter was Smith's attorney, presenting the petition in the Louisville and Nashville case. That was then their construction of the law.

See 1 Int. Com. Commission Reports, pp. 31, 32, last paragraph, naming petitioners; 37 to 42, giving grounds of petition, and page 53, showing position of Mr. Baxter and Mr. Stahlman then.

Within a few days after the passage of the interstate commerce act there were fifty-eight such applications. Thirty-three of them were from points outside of the territory dominated by the Southern Railway and Steamship Association. Among those thirty-three were the transcontinental roads. We have before us the suggestions submitted them by Mr.

Charles H. Tweed as counsel for the Southern Pacific Railway Company. In it he said: "It must undoubtedly be assumed that it was the purpose of Congress that what may be called the general rule of the fourth section should apply, except in those cases where, in the judgment of the Commission, reasons existed for suspending or dispensing with its operation. x x x x x x Congress imposed upon the Commission the duty and responsibility of determining in respect to the exercise of the dispensing power, not undertaking to prescribe whether that power should be exercised in many or in few cases, but prescribing that it should be exercised in those cases where, after investigation, the commission concluded that occasion existed for its intervention in this regard," etc.

But this kind of contention seems *ad captandum hominem* and may be worthless. Concede that, nevertheless, it is for us a fair set-off to their citing the early decisions of the commission on this subject.

N. J. HAMMOND,
GEORGE F. EDMUNDS,
Counsel for Interstate Commerce Commission.

Office Supreme Court, U. S.
FILED.
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CLERK

Supreme Court of the United States.

OCTOBER TERM, 1894.

Nos. 729 & 832.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY ET AL., APPELLANTS,

vs.

THE INTERSTATE COMMERCE COMMISSION AND CROSS-APPEAL.

Points Submitted by Mr. Edmunds and Mr. Hammond, of Counsel for the Interstate Commerce Commission.

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(NOTE.—Untoward circumstances of time and health have compelled Mr. Hammond and myself to submit our views in separate parts, but it is hoped that we have not thereby subjected the Court to much iteration.

GEORGE F. EDMUNDS.)

STATEMENT.

The facts and circumstances are set forth quite at large in the other brief. It is sufficient to state here that the three railways concerned are, first, the Cincinnati, New Orleans and Texas Pacific from Cincinnati to Chattanooga; second, the Western and Atlantic from Chattanooga to Atlanta, Georgia; third, the Georgia railroad from Atlanta to Augusta.

The petition filed with the Commission was by shippers of buggies from Cincinnati over these three roads to Social Circle, a place on the Georgia railroad between Atlanta and Augusta and distant from Atlanta 52 miles and distant from Augusta 119 miles.

The petition stated that the first-class rate of freight from Cincinnati to Atlanta (477 miles) was $1.01 per hundred pounds; that the rate from Cincinnati to Augusta over the same lines (648 miles) was also $1.01 per hundred pounds; that the rate from Cincinnati to Social Circle over the same lines (525 miles) was $1.31 per hundred pounds.

This was complained of as unjust and also as violating section 4 of the interstate commerce act. (R., pp. 5, 6.)

The parties having appeared, the Western and Atlantic railroad answered by a letter, claiming that these differences of rates did not violate the law, and also that there was water competition, and that the rate was not unreasonable. (R., pp. 6, 7.)

The answer of the Georgia railroad admitted that the defendants were acting under a common arrangement for continuous carriage, etc., between the various points named in

the three different States; that the rate on buggies, etc., from Cincinnati to Atlanta (473 miles) was $1.01 per hundred pounds, but that it was an "unauthorized rate," whatever that may mean; that the proper rate from Cincinnati to Atlanta should have been $1.07 per hundred pounds; that the rate from Cincinnati to Augusta over the same lines of railroad (645 miles) is $1.07 per hundred pounds; that there was no arrangement with the roads between Atlanta and Cincinnati for through rates from Cincinnati to any station on the Georgia railroad other than to Milledgeville and Augusta, Athens and Washington; that on the through bill of lading from Cincinnati to Social Circle the rate is made by adding to the rate from Cincinnati to Atlanta the local rate from Atlanta to Social Circle; that the rate from Atlanta to Social Circle is reasonable; and also the rate from Cincinnati to Social Circle is reasonable and lawful because it is exacted "not under substantially similar circumstances and conditions," because there are carriage manufacturers at Baltimore and other eastern cities whose goods are transported from said places to Augusta at such rates that if the respondents were to charge a higher rate than $1.07 from Cincinnati to Augusta no freight of this character would come over the Georgia road, because eastern goods would exclude the products of the Cincinnati manufacturers from Augusta; that while no arrangement exists for through bills of lading from Cincinnati to Social Circle, as a matter of fact the shipments were made on through bills of lading. (R., pp. 7, 8).

The answer of the Cincinnati, New Orleans and Texas Pacific Company says that the three railways are not under a

common control or arrangement for a continuous carriage; that its rates as published from Cincinnati to Atlanta is $1.01 per hundred pounds; that the rate from Cincinnati to Social Circle is $1.31 cents; that the division between the three roads of the $1.01 rate is 71.6 cents, C., N. O. & T. P., and 29.4, W. & A.; that the proportion of the C., N. O. & T. P., Cincinnati to Augusta, is 52.6, W. & A., 21.6, and Georgia R. R. 26.8; that the rate to Atlanta is reasonable; that the rate to Augusta is the same as to Atlanta because it is governed by the rate from Baltimore and New York to Augusta, which is made on account of water competition via Charleston and Savannah; that the relative distance of haul and proportionate amount of service performed in carrying goods to Augusta being less than the distance and service to Atlanta, the compensation of the C., N. O. & T. P. is relatively less; that the rate to Social Circle must be by consent of the Georgia railroad, and the Georgia railroad insists on having 30 cents more from Atlanta to Social Circle than from Atlanta to Augusta. (R., pp. 9, 10.)

All the principal facts of the transaction being undisputed, only one witness was examined—C. C. Harvey—on behalf of the defendants. (R., pp. 44, 45). This witness stated that the rates are made by the Southern Railway and Steamship Association (R., pp. 45, 46); that the freight money is divided on mileage between Cincinnati and Augusta (R., p. 46); that the rate was $1.01 per hundred pounds both to Atlanta and to Augusta (R., p. 46); that the rate from Cincinnati to Chattanooga was 76 cents; from Cincinnati to Social Circle, $1.31 (R., p. 47); that Social Circle is not near enough to the seaboard to be affected by the steamship competition (R., p. 47); that the C., N. O. & T. P. has no power

to compel the Georgia railroad to reduce its rate; that Social Circle is 52 miles from Atlanta and 119 miles from Augusta (R., p. 48); that the competition of eastern manufacturing places requires that Cincinnati merchants should have as low rates to Augusta as to Atlanta (R., p. 48); that the rate of $1.01 to Atlanta is reasonable (R., p. 49); that the rate from Cincinnati to Atlanta is greater than from Cincinnati to New Orleans on account of river competition.

The report and opinion of the Commission appears on pages 12 to 21. Its order was that the roads desist from charging more upon the kind of property in question from Cincinnati to Social Circle than from Cincinnati to Augusta, and that the C., N. O. & T. P. and W. & A. companies desist from charging any greater aggregate compensation from Cincinnati to Atlanta than $1 per hundred pounds. (R., p. 22.)

The defendants disobeyed the order and proceedings were begun in the circuit court for the northern district of Georgia to enforce it. The petition appears on pages 1 to 5 of the record. The answers in the circuit court appear on pages 25 to 36, one of which is by the Louisville and Nashville Company, etc., as successor by lease, etc., of the Georgia railroad. The L. & N. answer admits an arrangement between the roads for the continuous carriage of goods from Cincinnati to Augusta at certain agreed rates (R., p. 26); that after the offense complained of the freight agent issued a circular requesting that in bills of lading from Cincinnati, etc., to Social Circle and other points on the Georgia railroad no rates be inserted east of Atlanta excepting four stations named; that since that time through shipments had been computed on the sum of all the rates, including

the 30 cents from Atlanta to Social Circle, etc. (R., pp. 28, 29.)

That the rate from Cincinnati to Atlanta was fixed by rail competition, and it is reasonably low (R., p. 30); that the rate of 30 cents from Atlanta to Social Circle is fixed by the Georgia Railroad Commission and is reasonably low; that shipments from Cincinnati to Augusta are on bills of lading guaranteed by the C., N. O. & T. P. on to Augusta at $1.07 per hundred; that this is on account of competition not only of railways, but of eastern cities. (R., pp. 30, 31). They "admit that freight carried from Cincinnati to Augusta is carried over the same lines and in the same direction as freight which is carried from Cincinnati to Social Circle." (R., p. 31). They insist that the circumstances and conditions are not the same because Social Circle is a local station to which there are no rival lines (R., p. 31); that in the division of the freight money between Cincinnati and Augusta the Georgia road receives only 28.4 cents per hundred pounds. They state that "respondents can carry at that rate at a slight profit" (R., p. 32.); that the local rate from Atlanta to Augusta is 64 cents, but the other roads could not afford to divide on that basis, "considering the relative mileage of the different roads "(R., p. 32); that the total rate cannot be increased on account of water competition to Augusta.

The answer of the C., N. O. & T. P. road admits that the freight is carried over the three roads from Cincinnati to Social Circle and to Augusta without break of bulk. (R., p. 35). It admits the rates, as before stated, but that the greater rate for the shorter distance is justified by "circumstances and conditions" (R., p. 36); that it does not make a

rate from Cincinnati to Social Circle, but gets its compensation on a mileage proportion as far as Atlanta. (R., p. 36.)

Much evidence was taken, the substance of which is stated in the other brief. The main facts are undisturbed. The great mass of the evidence taken on the part of the defendants is directed:

1st. To general competition of manufacturing cities and markets and whatever there is of the sea lines from eastern cities to Charleston and Savannah that might affect transportation inland to points on the lines named.

2d. To a futile effort to prove that the words "substantially similar circumstances and conditions" in the act of Congress had a definite railway meaning before the passage of the act.

3d. To prove that circumstances and conditions become dissimilar with every varying phase of transportation to and from every railway station and to considerations of developing personal industries and enterprises and to relations between different distant places of production and manufacture and different competing markets;—all of which, the respondents contend, they are the best judges of, and that it is a part of their just railway policy to regulate and control all such matters, ignoring the fact that they all exist and carry on their business under public authority and for public purposes and ignoring the fact that whatever of paternalism may exist in any government has not been confided to them.

It appears that the Southern Railway and Steamship Association controls the whole business of rate-making and

transportation in, as well as into and out of, the territory south of the Potomac and Ohio rivers and east of the Mississippi. (R., p. 245.)

The articles of the association appear in the Record, pages 245–257. Its professed object, as stated in the preamble, is, first, to maintain uniform rates, prevent unjust discriminations; and, second, to secure a proper correlation of rates, such as will protect the interests of the competing markets, etc. Its agreements establish the principles of control in the territory and provide that, for the purpose of securing the greatest amount of net revenue, what are termed western lines shall protect the revenue of eastern lines, under the rates fixed by the association, so far as can be done by the exaction of local rates, and the eastern lines shall, in like manner, protect the western. It makes a geographical boundary between the eastern and western lines and provides against making joint rates crossing that boundary. It provides for fixing rates and settling disputes, and, finally, for a board of arbitration whose decision shall be final and conclusive. It makes hard and fast rules for the keeping up and control of the government of this Territory and the keeping up of the rates, etc.

The circuit court dismissed the petition. On appeal, the circuit court of appeals reversed the decree of the circuit court and decreed that the respondents should not make any greater charge on buggies, etc., from Cincinnati to Social Circle than from Cincinnati to Augusta, and the court of appeals denied the relief prayed for in relation to charges from Cincinnati to Atlanta. (R., p. 389.)

The assignments of errors are found on page 390 of the Record and page 1 of the Record of the cross-appeal.

POINTS.

I. The order of the Commission fixing the rate from Cincinnati to Atlanta at $1.00 per hundred pounds was just.

a. The answers and the evidence show that there was a profit on the carriage from Cincinnati to Augusta, a distance of 648 miles, at the rate of $1.01 per hundred pounds.

b. It must follow beyond sensible dispute that a rate of $1.00 from Cincinnati to Atlanta (477 miles), 171 miles less distance, must furnish a much larger profit.

c. The gross enormity of the charge is apparent when the distances and rates are compared. From Cincinnati to Atlanta is 474 miles, from Atlanta to Social Circle is 52 miles further—making 526 miles from Cincinnati to Social Circle; and from Social Circle to Augusta is 119 miles—making 645 miles from Cincinnati to Augusta.

The price exacted to Social Circle was $1.31 and afterwards $1.37 per hundred pounds. The "profitable" price received from Cincinnati to Augusta was $1.01 and later $1.07 per hundred pounds. The rate per ton per mile as exacted to Social Circle was 5.2 cents, a distance of 526 miles. The rate received to Augusta was 3.3 cents per ton per mile—645 miles—and 119 miles further than to Social Circle. So that the rate for the shorter distance, being 52 tenths of a cent per ton per mile as against 33 tenths for the longer distance, is 66 per cent. greater. In round numbers, it is as 5 is to 3. This is almost double,

computing on the percentage that the railways everywhere act upon between themselves. The rate per hundred pounds from Cincinnati to Augusta, if based on the rate per ton per mile from Cincinnati to Social Circle, would be $1.68. In round numbers, this is over 60 per cent. increase if the same charge only were made to Augusta as to Social Circle. The rate per hundred pounds from Cincinnati to Social Circle, if based on the rate per ton per mile from Cincinnati to Augusta, would be 87 cents, making 50 cents per hundred pounds difference. The Social Circle rate is 28 per cent. greater than the Augusta rate as it stands, without respect to distance, and the Social Circle distance is 18.4 per cent. less than the distance to Augusta.

II. The Commissioners had the power to establish a maximum rate on a definite class of goods between defined places in different States in a case in which the subject was properly before them, as it was in this case. The charge from Cincinnati to Atlanta was a necessary element in the disposition of the charge to be made from Cincinnati to Social Circle and Augusta, for if the Commission had stopped at the requirement of a given rate from Cincinnati to Social Circle as not exceeding that to Augusta, the roads from Cincinnati to Chattanooga and so to Atlanta might have so changed their charges as to have made a through rate unjust to the road from Atlanta to Social Circle and Augusta. Thus it was essential to complete and permanent justice and relief that both points should be covered by the decision of the Commission.

The 12th section of the Interstate Commerce Act, as amended, requires the Commission "to execute and enforce

the provisions of this act." The 13th section of the act authorizes the Commission to investigate any complaints that may be made concerning interstate transportation and to "institute any inquiry on its own motion" in respect of interstate transportation. The 14th section provides "that whenever any investigation shall be made by said Commission, it shall be its duty to make its report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation," etc., and the act makes all such proceedings a matter of record. The fifteenth section provides that when the Commission shall have found that any wrong is being done by any carrier and shall have come to its conclusion thereon in the manner before stated, it shall forward a copy of its report to the carrier, "together with a notice to said common carrier to cease and desist from such violation," etc. Thus it was distinctly within the substantial and remedial language of the act that the Commission should have power, on a complaint that transportation charges were too high, to require that they should not exceed a certain sum named in the order of the Commission. Again, it is obvious that a mere order of the Commission in the case in hand, or in any other similar case, that a particular rate complained of was excessive and should not be demanded, and, stopping there, would be absolutely futile, not to say ridiculous, for, if the excessive rate were found to be one dollar and the true and just rate fifty cents in a given case, if the Commission were to direct that one dollar should not be charged, the carrier could obey that order by charging ninety-nine cents and then, after a new complaint should have been instituted and heard and ninety-nine cents found

to be excessive, that order could be obeyed by reducing the charge to ninety-eight cents, and so on, step by step, on a fresh suit for each case, at last reach the just rate of fifty cents. It is worse than absurd, we submit, to put any such construction as this upon the act of Congress.

A considerable part of the defendants' testimony is directed to trying to prove that distance is no factor or a very small one in fixing rates to be paid for transportation. They contend that the true and only guide is what the service is worth to the shipper—*i. e.*, what the shipper "can bear;" but if it be true (as to a degree it is) that the value of the service to the shipper is an element in the justness of rates, is it not equally true and an inseparable part of the same equation that the cost of service to the carrier is also an element of the same or greater importance? For instance, in a certain state of the market we will suppose that a shipper can afford to pay ten thousand dollars for carrying one thousand bales of cotton from New Orleans to New York and can then make a profit of five thousand dollars on the transaction. The cost of the service to the carrier is two thousand dollars, so that his profit on the transaction is eight thousand dollars. The shipper in such a case can more justly say that the true rule is the cost of service than the carrier can say that the value to the shipper is the true rule. If we keep clearly in mind that the carrier is engaged in a public service and as such has no business to consider questions of governmental or social policy, or private affairs of his customers, then it must be seen that the profit or loss of the shipper is a matter with which the carrier has no concern further than being ready to carry

persons and goods for all alike at fairly remunerative rates. Innumerable illustrations in the every-day operations of society demonstrate the correctness of this proposition.

The evidence everywhere shows almost without exception that, as between carriers themselves, mileage is the substantial and exclusive basis for divisions of receipts among themselves. Where there is an exception it is because a particular carrier happens to have it in his power to extort a larger ratio from his co-carriers or because, by a previous compact, so-called "constructive mileage," or "differentials" have been agreed upon by which a much longer and competing route is agreed to be considered, in dividing the spoil, as a certain number of miles shorter than it really is. (R., pp. —.)

III. The defendants violated the fourth section of the act in exacting a larger sum for the transportation of the same class of goods from Cincinnati to Social Circle than from Cincinnati to Augusta without the permission of the Commission.

The fourth section, both in letter and in spirit, forbids acts of this character being done without a previous application to the Commission for leave to do so. That leave can, in the very language of the section, only be granted "in special cases after investigation by the Commission," and the section declares that "the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act."

The prohibitory part of the section is absolute, and if the respondents are within its operation at all, they cannot do

the prohibited act without the authority of the Commission, especially granted on special investigation. If the act be done "under substantially similar circumstances and conditions" it is prohibited.

It may be said that the Commission has heretofore, sometimes, put a very broad construction upon this phrase, and has taken into consideration water competition with a railway as a circumstance warranting a larger charge for a shorter distance. If this be so, it was the exertion of a power, whether wisely exerted or not, that the section gave the Commission, for there is no limitation in the proviso regarding the class of cases or state of circumstances under which the Commission may relieve the carrier other than that the case must be special and it must be investigated and the Commission must determine the extent to which the carrier may be relieved. It is a matter of public knowledge that soon after the act went into effect, a great number of the railways applied to the Commission for relief under the fourth section upon what was then universally understood to be its true construction, and that the matter finally simply drifted into the practice of the railways to decide in the first instance, and at their peril, what they could do consistently with the fourth section. But we are now to ascertain what the law is, without regard to any supposed previous latitudinary construction, adopted either by the carriers or by some members of the Commission.

It is submitted that the phrase "under substantially similar circumstances and conditions" applies only to physical conditions applying to and inherent in the very act of transportation, and that it does not embrace any extraneous considerations of competition or policy whatever.

The fundamental and complete description of the subject of the section is "transportation" and "distance." It follows therefore, grammatically, as well as in common sense, that the circumstances and conditions relate to the act of transportation and its distance, and nothing else.

It has been suggested, in some of the former discussions, that the words "under substantially similar circumstances and conditions" in the fourth section must mean the same thing that they mean where used in the second section, and, so, it has been argued that the words in the fourth section should take into view considerations extraneous to the mere acts of and connected with transportation. But this contention is entirely illusory. Both phrases are predicates, and what they include depends upon the subjects to which they relate. The subject in the second section is the subject of giving special preferences to persons, and the circumstances and conditions of those special preferences are a description of the nature of the relations to persons and their business, and they operate only, therefore, in the field of moral fair play in the relations of men and business, while the same words in the fourth section are predicated of the mere act of physical movement and physical distance, without any regard to persons, preferences, business relations, or any other thing than that stated. The use of the same words, therefore, as applied to entirely different subjects in section two, cannot be made to import into the fourth section considerations and relations to which in the second section the same words are applied. This is too obvious, we think, to need enlargement or illustration.

The previous sections of the act covered the whole subject of equality and fair play as it regarded persons, business,

locality, and kinds of traffic. Then came the fourth section, which excluded all personal and political considerations which might enter into questions of equal rights, and provided a definite prohibition of a particular class of acts relating alone to the mere movement of persons and property in cases in which it would be general and almost universally manifest that the acts dealt with were a public wrong; and this is made more clear by the provision in section four that the prohibition should not authorize the carrier to receive even as great compensation for the shorter as for the longer distance, thus leaving that part of the subject to fall within the provisions of the other sections relating to unreasonable charges and unfair preferences.

This enactment made a hard and fast rule as plain as language could make it. The proviso enabled the Commission, in extreme cases that could not be foreseen and described, to relieve the carrier from the prohibition to such an extent only as the Commission should think the particular case warranted. If this be not the true meaning of the section, the proviso is altogether useless and can have no application in any possible instance, for if the words "under substantially similar circumstances and conditions" are to be taken as referring to all questions of competition, policy, and combination, embracing every relation of trade, not only as to routes but as to places of production and sale, there could be no case whatever in which it would be necessary for the carrier to apply to the Commission.

But it is contended on the other side that the words "same line," used in the fourth section, do not apply to the facts of this case. That is, that goods moving from Cincinnati to Social Circle in the same car with goods of the same kind

moving from Cincinnati to Augusta do not pass over the *same* line. This is upon the theory that the line mentioned is not a physical thing, but is really something resting in contract or agreement between railways, and that therefore if the agreement between the carriers to carry to Social Circle was one agreement and the agreement to carry to Augusta was another agreement, such agreement made two distinct lines, and therefore the act complained of is not within the statute. The respect due to one or two eminent judges compels us to discuss this point somewhat particularly, and we submit—

a. That the words in the fourth section, "the transportation of passengers or like kind of property," can mean nothing else than the movement of physical things in a physical way. That they cannot move on paper or oral agreements.

b. That the words "for a shorter than for a longer distance" exclusively relate to physical subjects.

c. That the words "*over* the same line" mean exclusively a physical movement over a physical thing.

d. The word "lines" is twice used in the third section, first as respective to companies, and second as physically connecting.

e. The first section of the act, upon which all the other sections and provisions are based, describes and defines the whole subject. It declares "that the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad,

or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment," from State to State, etc. We insist, therefore, with great respect, that the word "line," whatever it may be sometimes made to mean by contract between carriers, is embraced within the provisions of the act and is included in the word "railroad" as used in the first section and under whatever contrivance the carriers may adopt by "contract, agreement, or lease," as specifically stated in the first section.

f. In section 6 of the act the word "route" is twice used as synonymous with "line" and "road." If the contention of the other side be correct, there can be, if the carriers so choose (and, of course, they will), no possible case in which the fourth section can operate at all, for there can be no shorter or longer distance between two specified places over the same tracks. Under this "revelation" (as it was called by one of the counsel for the railways in the argument below) every station between Cincinnati and Augusta is or may become situated on a different "line" from that of every other station than the particular station to which a shipment is made from it. Thus, on the mathematical principle of the permutation of numbers, if there are 100 stations between Cincinnati and Augusta, each station might have a line to every other station=100 lines. The whole number of lines, therefore, for the 100 stations would be 10,000. Apply this rule to all the stations in the United States, as we must if we apply it to Cincinnati and Augusta, and the result is exceeding great. Such reasoning results, in effect, in making remedial statutes nugatory.

g. The defendants themselves, or some of them, "deeply versed in all the learning of the Greeks," have distinctly stated in their answers that the traffic in question was carried by continuous shipment over the same line from Cincinnati to Social Circle and from Cincinnati to Augusta. This, as coming from such a source, is entitled to some weight in regard to the meaning of words in constant, common use in railway operations.

For still further elucidation of this topic see the other brief.

IV. The true construction of the fourth section leaves it with the Commission alone to determine whether the circumstances and conditions are substantially dissimilar so as to justify allowing a greater charge for a shorter distance. It is impossible to conceive an instance in which, the circumstances and conditions being the same in substance, it would be just to charge more for the less than for the greater service. The proviso is a limitation upon and controlling of the whole of the preceding sentence, and reading the whole together it plainly imports that the Commission is to be the judge of when and how the circumstances and conditions will fairly warrant a departure from the obvious general rule of justice provided for in the section. To hold otherwise would give the section the effect of granting a license to a particular carrier to do under the same circumstances and conditions what all the others could not do. If the section were considered otherwise it would seem to follow that every carrier, whether in combination or competition with others, would be free from the operation both of the second and fourth sections, for there can hardly ever be a

similarity of circumstances and conditions, *measured by the standards insisted upon by the defendants*, in respect of any transportation whatever. Even in respect of traffic between the very same places there may be dissimilar circumstances and conditions as regards the various enterprises of the people engaged in business at the two places; and, of course, it need not be said that as regards transportation not between the same places any comparison may always show dissimilarity in extraneous circumstances and conditions. To put such a construction upon the act (which is the necessary logic of the defense) is, beyond dispute, to render the whole provision of the act of Congress absolutely nugatory.

We beg leave to submit in the nature of an appendix to our briefs the pamphlet prepared for use in the court below containing extracts from parliamentary reports relative to long and short hauls and discussions of the English cases.

We attach hereto—

Diagram No. 1, graphically showing the increase and diminution of charges between Cincinnati and Augusta.

Diagram No. 2, illustrating the effect upon different places on the same line as it regards service, mileage, and gains.

Paper No. 3, map of the United States, showing certain equal distances from Cincinnati and showing the portion of the country in the possession of the Southern Railway and Steamship Association.

GEORGE F. EDMUNDS,
N. J. HAMMOND,
Of Counsel.

Office Supreme Court, U. S.
FILED.
JAN 7 1895
JAMES H. McKENNEY
Clerk

[Analysis of American cases referred to in Appellee's brief in the case of The Cincinnati, New Orleans & Texas Pacific R. Co. *et al.*, Appellants *v.* Interstate Commerce Commission and cross appeal, Supreme Court of the United States, Nos. 729 and 832.

ANALYSIS

OF

AMERICAN CASES.

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ANALYSIS

OF

AMERICAN CASES.

CASES DECIDED IN UNITED STATES COURTS SINCE THE ACT TO REGULATE COMMERCE WAS PASSED.

LONG AND SHORT HAUL CASES.

"Under section 4 of the Interstate Commerce Law, relating to the charges for the long and short haul, it seems that where the circumstances and conditions are dissimilar there is no prohibition. Where the circumstances and conditions are similar the prohibition attaches, *and that where it is difficult to point out clearly the circumstance or condition which produces dissimilarity the doubt should go in favor of the object of the law, and the circumstances and conditions should be taken as substantially similar. Where the circumstances and conditions are similar, or substantially similar, and the result to the carrier is injurious, relief can be had only through the Commission.*"

Missouri Pac. R'y Co. *v.* Texas & P. R'y Co., 31 Fed. Rep., 862.

The court further said: "If any specific question is presented for the answer of the court, it is *whether competition between carriers is a circumstance or condition of the carriage in this sense in which those words are used in the fourth section of said law.*"

The court carefully refrained from deciding the question, and referred the applying receivers to the construction given to the section by the Commission. In fact, the court went

still further and said: "Whether in any particular case there is that competition on the long haul that will justify a lower charge for the long haul than is charged for the short haul under otherwise similar circumstances and conditions, must be determined on the facts of the particular case, *keeping in mind that, where the matter is not clear, the object and policy of the law should prevail.*"

This opinion was rendered in June, 1887, soon after the law took effect. The court stated that the opinion was mere advice to the receivers, and that it might change its mind on hearing full argument of the parties at interest.

In *Ex parte* Koehler, 31 Fed. Rep., 315, it was held by Judge Deady, upon application for advice by a receiver, that "freight carried to or from a competitive point is always carried 'under substantially dissimilar circumstances and conditions' from that carried to or from non-competitive points." The very sweeping character of this ruling is sufficient to condemn it as an authority for general application. It is matter of common knowledge that there are thousands of competitive points in this country which do not take lower total rates than are voluntarily charged by the same carriers to intermediate points. To affirm that competition always creates dissimilarity in circumstances and conditions is to say that such competition in every instance forces lower charges for longer than are applied to shorter hauls. The facts do not bear out the principle. The application in this case was based upon the existence of water competition, and Judge Deady had particular reference to that mode of carriage. He gave no construction to the proviso clause of the section, and paid no heed to the disastrous

effect of his dicta, if generally followed, upon the operation of the section.

It was held in the United States circuit court for the southern district of Iowa that, in an action for breach of the fourth section, the fact that the rate for the longer distance was established jointly between defendant and connecting railroads does not exempt the defendant from liability.

Junod *v.* Chicago & N. W. R'y Co., 47 Fed. Rep., 290.

The court said: "The company, in making this joint rate, is charged with the duty of observing the provisions of the Interstate Commerce Law, and it cannot by entering into a joint rate so arrange tariffs that it shall unjustly or unduly discriminate against its patrons in Iowa in favor of those who make shipments from Nebraska; and the mere fact that this effect is brought about by a joint rate does not, in my judgment, enable the defendant to escape from the consequences of having aided in establishing the rate by a joint arrangement with the lines in Nebraska."

Here the court held that the fact of the longer-distance rate being over a joint line and the shorter-distance charge over but a single road did not remove the greater short-haul charge from the prohibition of the fourth section. In this case the defendant endeavored to set up as justification for the longer-distance rate that "cut rates" had been instituted by reason of competition between the defendant and other companies; but the court refused to admit this evidence upon the ground that there was not sufficient ground laid in the pleadings to authorize the

plea to be admitted. There was no decision in this case as to whether competition did or did not make out a dissimilarity in the circumstances and conditions.

On November 9, 1891, the same court decided the case of Osborne *vs.* Chicago and Northwestern R'y Co. The long and short haul clause of the Act to Regulate Commerce was there very fully construed. The court held, as it did in the Junod case, that the fact of the long-haul rate being fixed by a joint agreement with other roads does not render the circumstances and conditions substantially dissimilar. Neither can the railroad company justify itself in charging more for the shorter than for the longer haul, "because the result comes about by reason of the selection of different points on the line as a basis for computing rates, so as to charge one rate over one part of the road and a different rate over another part." As to the effect of competition upon charges for longer and shorter hauls the court ruled:

"Under the Interstate Commerce Law the power of determining whether a railroad company is relieved from the operation of the long and short haul clause lies solely with the Interstate Commerce Commission; and in an action for damages in a Federal court for a violation of that clause, when no authority from the Commission is shown, *the company cannot claim that it was justified in so doing by reason of the existence of a secret cut rate among competing roads*, whereby a large part of the traffic naturally tributary to it was diverted."

Osborne *v.* Chicago & N. W. R'y Co. 48 Fed. Rep., 49.

Upon this question of competition the court said: "It is the view of the court that that question cannot be determined. The consideration of questions of that kind—of

the right of the railway company to be excused from the duty and obligation that is placed upon it by the fourth section of the Interstate Commerce Law—*is, by the express terms of the law itself, conferred upon the Interstate Commerce Commission.* As you know, there is a body of commissioners provided for by this Interstate Commerce Act, and the fourth section of that act, by its express terms, *in a proviso that is therein contained,* places upon the Commission the duty and gives them the authority to investigate and determine whether there are such facts and circumstances surrounding a railroad at a given time as would justify the Commission in authorizing the railway company to charge a greater sum for a shorter than for a longer haul over the same line, in the same direction, under otherwise substantially similar circumstances. In the view that the court takes of it this court and jury cannot determine that question, which, by the law, the Commission are authorized to determine. Whether the railway company was justified by a cut rate, making what was called in argument 'illegitimate competition,' and circumstances of that kind which grew out of the handling and management of the railroad business of the country by other competing lines and its effect upon the business of the defendant company, in the judgment of the court, is a question that cannot be submitted to you. Questions of that kind are for the judgment and determination of the board of commissioners appointed under this act, *and the courts and juries,* when they are called to act upon particular cases arising under this act, where it is claimed that the law has been violated, *are only authorized to determine the question whether, in the service rendered, the character of the property, its conveyance, and other facts which inhere in the carrying of*

the freight upon the particular line which is charged with the wrong-doing, there existed dissimilar circumstances and conditions, relieving the company from the charge of collecting the larger rate for the shorter haul over the same line, in the same direction, and under otherwise substantially similar circumstances and conditions. Now, then, if the railway company had been authorized to do that, then they would plead and prove that fact, and it would then be the duty of the court to instruct the jury that that would justify the railway company in making the larger rate for the shorter distance; but no such action has been taken by the Interstate Commission. They have not been called upon to act, and they have not authorized the railway company to charge a greater sum for the shorter than for the longer distance."

"Under the circumstances I have detailed before you, as I view it, this court and jury cannot authorize the railway company to make such charge, or justify it after it has been done. There is no evidence in this case that the railway commission has ever passed upon the question or authorized the railway company to charge a greater sum for the shorter than for the longer distance."

Osborne *v.* Chicago & Northwestern R'y Co., 48 Fed. Rep., 49.

The cases of Junod and Osborne were taken by the defendant to the circuit court of appeals, and it was there decided, October 17, 1892, that where two railroad companies owning connecting lines of road unite in a joint through tariff they form for the connected roads a new and independent line, and the through tariff on the joint line is not the standard by which the separate tariff of either

company is to be measured in determining whether such separate tariff violates the act of February 4, 1887, section 4, which forbids greater compensation for a shorter than for a longer haul.

Chicago & N. W. R'y Co. *v.* Osborne, 52 Fed. Rep., 912.

This is the "line" decision of Mr. Justice Brewer. The only portion of the decision rendered in the lower court which was overruled by the court of appeals was that relating to individual and joint lines. In fact, the reasoning indulged in by the learned justice in arriving at his construction of what constitutes a line may be considered as approving the doctrine laid down in the lower court that the effect of competition is a question for the Commission to consider under the proviso clause of the section. He said: "That we may not be misunderstood, we do not mean to intimate that the two companies, with a joint line, can make a tariff from Turner to Cleveland (the shorter distance) higher than from Turner to Buffalo (the longer distance) or any other intermediate point between Cleveland and Buffalo; for when the two companies, by their joint tariff, make a new and independent line, that new and independent line may become subject to the long and short haul clause."

In deciding the Osborne case the court of appeals seems to have been led into the error of confusing proportions of joint rates with total rates. This is a common error. The distinction between total through rates and the proportion which a company receives out of a joint rate is very frequently overlooked. It is settled law that the local rates of

a company are not comparable with the proportion which that company receives for carrying the same distance out of a joint rate applying over a longer distance. It was made to appear in the court of appeals that the shorter-distance rate was a local charge from Scranton, Iowa, to Chicago, while the longer-distance charge from Blair, Nebraska, through Scranton to a point near Chicago was not an aggregate rate, but part of the through charge in effect from Blair, the point of shipment, through to New York and other eastern points. It is therefore clear upon the facts as stated in the court of appeals' opinion, that total or aggregate rates were not being compared. The comparison was between a local rate to Chicago with the proportion of a through rate to New York. It was wholly unnecessary upon this state of facts, to hold that aggregate rates over a joint line cannot be compared with the local rate on one of the constituent roads in the line. The decision of the United States Supreme Court in the Union Pacific Railway Company *v.* U. S. (117 U. S., 362), and nearly every decision subsequently rendered by State and Federal courts involving the question, and every ruling of the Interstate Commerce Commission in regard to the comparison of local and portions of joint rates, are in harmony upon the point that such comparison is improper. But to go further, and deny the propriety of comparing a total joint rate with an individual rate, was a novel ruling and wholly unnecessary to a decision of the Osborne case. Moreover, a denial of the right to compare aggregate rates with each other would destroy one of the most efficient aids employed by commissions and courts in arriving at the relative reasonableness of rates to different communities.

The fact that this construction of the meaning of the word "line" was not necessary to the decision arrived at is not the only indication that the court of appeals overlooked the distinction between using part of a joint rate as a standard of comparison, *which is improper*, and using as such standard the entire joint rate, *which is proper*. As further indicating that this distinction was not brought clearly to the attention of the court, the following paragraph is quoted from the opinion of the court:

"It is worthy of note that in the debates which attended the passage of this bill through the two houses, and while this matter was under discussion, it was again and again said by those participating in the debates that the line formed under the joint tariff of connecting companies was one separate and independent from that of either of the connecting companies, and also worthy of note that in the actual administration of affairs by the Interstate Commerce Commission the same thing has been constantly recognized."

The Interstate Commerce Commission has never recognized or decided that it is improper to compare an aggregate joint rate with the rate to any intermediate point, though it has *invariably held* it to be improper to use a portion of a joint rate as the standard of comparison; and so with the debates in Congress—the distinction is always observable from a consideration of the subject under discussion.

The following extract from page 34 of the Commission's Sixth Annual Report makes this distinction very clear: "There is nothing in the debates in Congress before the law was passed which sustains the view that the joint line is independent of a constituent line in any other sense than the

authority to make joint rates lower than the sum of rates in force over the respective roads. This very authority was the cause of the discussion in regard to joint and individual lines. It was definitely stated in the debate that a through rate from San Francisco to New York over four roads, each charging $100 per car between its termini, need not for that reason be $400, but such through rate might even be as low as $100 for anything in the fourth section. And the authority thus given to the joint lines is no more than that possessed by the individual roads, namely, the right to charge rate which are not the sum of rates from station to station. So long as the aggregate shorter-distance charge is not more than the aggregate longer-distance charge the fourth section is not violated, and distance proportions of individual rates or road divisions of through rates have nothing to do with the case."

The decision of the circuit court for the southern district of California in the case of The Interstate Commerce Commission against The Atchison, Topeka and Santa Fe Railroad Company and others (50 Fed. Rep., 295) was rendered with especial reference to the existence of water competition at the long-distance point. The general ruling of the court was that the greater charge for the shorter haul is lawful if the circumstances and conditions are not in fact "substantially similar," and the carrier may determine the question for himself, subject to a liability for violating the act if on investigation the fact be found against him. In determining the effect of competition the court cited approvingly the doctrine announced by Judge Deady in *Ex*

parte Koehler (31 Fed. Rep., 862), that freight carried to or from a competitive point is *always* carried under substantially dissimilar circumstances and conditions from that carried to or from non-competitive points; but this, as before shown, would practically render the entire section nugatory, and is, moreover, in direct conflict with the principle announced by Judge Shiras in the Osborne case, *ante*, and inferentially approved when the case was decided in the court of appeals.

In the proceeding brought in the circuit court for the southern district for New York by the Interstate Commerce Commission against the Texas and Pacific Railway Company to enforce its order in what is known as the "Import Rate case," it appeared that the defendant, in conjunction with the Southern Pacific Company, made joint rates from New Orleans to San Francisco, covering the carriage of traffic by the rails of the defendant from New Orleans to El Paso and thence by the rails of the Southern Pacific Company to San Francisco, and also made joint rates with vessel-owners in London and Liverpool, covering the carriage of traffic from those places to San Francisco via New Orleans. It also appeared that the tariff rates of the Texas and Pacific and Southern Pacific from New Orleans to San Francisco were somewhat more than double the rates charged for the carriage of similar traffic sent from Liverpool or London by through bill of lading to San Francisco via New Orleans. This case, besides presenting primarily the question of unjust discrimination against shippers of domestic traffic in favor of import traffic, also

had in it the collection of a greater charge for the shorter distance from New Orleans to San Francisco than for the longer distance from Liverpool or London through New Orleans to San Francisco.

Judge Wallace said, upon the point of competition as affecting the "circumstances and conditions," "It must be conceded as true, for the purposes of the present case, that the rates for the transportation of traffic from Liverpool and London to San Francisco *are, in effect, fixed and controlled by the competition of sailing vessels between those ports, and also by the competition of steamships and sailing vessels in connection with railroads across the Isthmus of Panama, none of which are in any respect subject to the Act to Regulate Commerce.* It must also be conceded that the favorable rates given to the foreign traffic are, for reasons to which it is now unnecessary to advert, somewhat remunerative to the defendant, *and it must also be conceded that the defendant would lose the foreign traffic by reason of the competition referred to and the revenue derived therefrom unless it carries it at the lower rates,* and by doing so it is enabled to get part of it which would otherwise go from London and Liverpool to San Francisco around the Horn or by the Isthmus of Panama." The court concluded its opinion with the following paragraph:

"The Interstate Commerce Act would be emasculated in its remedial efficacy, if not practically nullified, if a carrier can justify a discrimination in rates merely upon the ground that, unless it is given, the traffic obtained by giving it would go to a competing carrier. A shipper having a choice between competing carriers would only have to refuse to send his goods by one of them, unless given exceptional rates, to justify that one in making the

discrimination in his favor on the ground of the necessity of the situation. The order is granted."

Interstate Commerce Commission *v.* Texas & P. R'y Co., 52 Fed. Rep., 187.

Here the court excluded competition of the most forceful kind (and competition, too, that is in no wise subject to the Act to Regulate Commerce) from those circumstances and conditions which may be considered in a case brought under the provisions of that act.

On October 17, 1893, the foregoing decision in the circuit court was affirmed by the circuit court of appeals. The opinion by Shipman, J., while not adopting the language used by Judge Wallace in the court below, nevertheless holds that this case (although involving an extreme instance of direct water competition from the foreign port to the destination in this country) does not justify the carrier in making the discriminating rates complained of. Judge Shipman says: "There was no difference in cost, expense, or exceptional character of the service in transporting the import or domestic traffic." *See* U. S. *v.* D. L. & W. R. Co. 40 Fed. Rep., 101.)

Upon the question of great disparity in the rates, the court adopted the principle laid down by the Interstate Commerce Commission in Board of Trade of Chattanooga *v.* East Tennessee, Virginia and Georgia Railroad Company, 5 I. C. C. Rep., 546: "Gross inequality shows either that the road which makes the inequality is unjust to itself in carrying goods without profit, or else the larger rate gives an unwarranted return for the services rendered."

In this case, says Judge Shipman, "The rates were not

entirely unremunerative, and, if so. the much larger rates placed upon domestic traffic not only compelled it to bear an undue burden, but gave the company an unwarranted return. It has justly been said by the Commission that rates should not only be reasonable, but be relatively reasonable, and thus not become unjust in their results. Citing Board of Trade Union *v.* Chicago, M. and St. P. R. R. Co., 1 I. C. C. Rep., 215."

Interstate Commerce Commission *v.* Texas and Pacific R'y Co., 57 Fed. Rep., 948.

In the case of the Interstate Commerce Commission against The Detroit, Grand Haven and Milwaukee Railway, recently decided in the United States circuit court, western district of Michigan, and not yet reported, the question at issue was whether the practice of cartage at Grand Rapids is, with reference to the shippers at Ionia, a shorter-distance point from eastern cities, in violation of sections 2, 3, and 4 of the Act to Regulate Commerce. The defendant claimed that the transportation to Ionia and that to Grand Rapids "are not under substantially similar circumstances and conditions." Rates from eastern cities to Ionia and to Grand Rapids, the longer-distance point were the same. The court held that this is a conclusive admission by the defendant that so far as the transportation from the east to the warehouses of the company at the two places is concerned it is under substantially similar circumstances and conditions. The court said in relation to the practice of cartage: "Any benefit in relation to the shipment of goods having a definite money value conferred gratis by the carrier upon one shipper which is not conferred upon another when the serv-

ice to each is admittedly under substantially similar circumstances and conditions is an undue reduction in the price of carriage to the former and is illegal. If this were not true, then the provisions against undue discrimination, of which the long and short haul inhibition is only one instance would be a dead letter."

The defendant also claimed that the competitors of the defendant railway have their stations at Grand Rapids, in the business center, and this places defendant at a disadvantage, which creates a dissimilar condition. Defendant's station at Grand Rapids was a mile and a quarter from the center of the town. Defendant's station at Ionia, the shorter-distance point, was a quarter of a mile from the center of the town. The court said upon this point: "Even if competition under such circumstances can produce dissimilarity of conditions, the extent of the discrimination founded thereon must be commensurate with and limited to the dissimilarity." The court by no means decided that competition could produce a dissimilarity of conditions and circumstances, but *assuming that it might*, the court said: "It will fully equalize the conditions if the defendant furnishes cartage for a mile and a quarter at a price equal to that at which cartage for a quarter of a mile could be furnished without loss. *To do more is to bid for competition by reducing the cost of transportation, and this cannot be done except by proportionately reducing the rates at Ionia also.*"

Interstate Commerce Commission *v.* Detroit, Grand Haven and Milwaukee Railway Company, 57 Fed. Rep., 1005.

The Union Pacific and Southern Pacific Roads had in effect a joint tariff and rate under which they carried sugar at a charge of 65 cents per 100 pounds from San Francisco, Cal., to Kansas City, Mo.. but the two companies charged for carrying sugar from San Francisco to Salina, Kans., the shorter-distance point, 94 cents per 100 pounds. Each rate was for shipments in car-load lots. Mellen and others, officers of the Union Pacific Company, were indicted in the United States district court, district of Kansas, for violating the provisions of the fourth section of the Act to Regulate Commerce by charging more for the shorter haul to Salina, Kans., than for the longer haul to Kansas City. Upon motion to quash the indictment the court held: "There is no allegation in the first count that the tariff rate to Salina was a joint tariff made pursuant to agreement between the Union Pacific and Southern Pacific roads." "If the rate charged to Salina was the local rate of each company, and the presumption is (in the absence of allegation that it was a joint rate,) that it was the local rate, the fact that they had a joint rate to Kansas City, which constituted a new line, would not furnish a basis upon which either company would be bound to adjust its own local tariff." (U. S. *v.* Mellen *et al.*, 53 Fed. Rep., 229.)

The court in this case followed *and expanded* the decision of Mr. Justice Brewer in Chicago and Northwestern R. Co. *v.* Osborne, *ante.* The charge from San Francisco to Salina, the shorter-distance point, was a single charge for one through shipment. In the Osborne opinion the learned justice described the essential requisite of a joint rate to be "a singleness of charge and a continuity of transportation," and held that where two roads together charge more for a

shorter than for a longer haul, when both the shorter and longer distances extend over both roads, they may violate the fourth section. His "line" decision was applied to where the shorter distance was over only one road and the longer distance covered two or more connecting roads.

In this case of Mellen the shorter and longer distance points were both upon the terminal road. How the through charge for continuous carriage from San Francisco to Salina, the shorter-distance point, was arrived at or divided by the participating roads cannot affect the responsibility of those roads for the charge which they together make to the public upon a through shipment between those points.

The "line" decision in the Osborne case was made to perform a double office in the decision rendered by the circuit court, northern district of Georgia, in this case of Interstate Commerce Commission against The Cincinnati, New Orleans and Texas Pacific R. R. Co. *et al.* (56 Fed. Rep., 925), now pending on appeal to the circuit court of appeals, fifth circuit. In the opinion by Judge Newman the "line" decision is not only made to absolve the defendant carriers from the charge of violating the fourth section, but it is also made to extend immunity from Federal control to a State railroad when it receives a sum equal to its local rate as its share of the through charge upon a through interstate shipment over a connecting line of which its road is part. The court holds:

"That the mere reception and continuous transportation by the Georgia R. R. Co. of freight which comes to it over other lines of railroads destined to its local stations, for

which the initial carrier has issued through bills of lading and quoted through rates, does not constitute such an 'arrangement' as is contemplated by the first section of the Act to Regulate Commerce, where the through rates so quoted allow to that company its full local rates."

The *roads together make one charge and one billing,* and *the carriage is actually continuous whether the shipment from Cincinnati is to Augusta or to Social Circle, the shorter distance point,* the only difference being in the amount of the charge and the manner in which the roads divide the through charge between themselves. The through charge to Social Circle might in amount be equal to the through rate to Atlanta plus the Georgia road's local to Social Circle; but the Georgia road might not retain the full local rate as its share. And yet, whether that road actually does do this or not is held by the Georgia Federal court to constitute the difference between what is and what is not a "common arrangement for continuous carriage or shipment."

This is expanding the "line" decision in the Osborne case with a vengance. That decision distinctly held that when connecting roads make a joint tariff they together cannot charge more for the shorter than for the longer distance when both the longer and shorter distance points are, as in this Social Circle case, upon the terminal roads. To say that the amount which each of the connecting carriers receives out of an aggregate charge for through shipment is to determine whether they have an arrangement for continuous carriage, *when, in fact, the carriage is continuous,* and is also to determine whether they violate the fourth section or not, is to use the proportion which a carrier recieves out of a through charge as the standard of comparison in de-

termining *whether it is subject to the law at all* in respect of the traffic carried, and at the same time reject the carrier's share of a through rate or charge as the standard of comparison by which to test the reasonableness of other rates. If it is improper to compare a carrier's local rate with what it receives out of a joint rate—and this is settled law—then it is equally improper to judge whether or not the carrier is subject to the statute by the mere amount of its share of a joint charge over connecting roads. The Act to Regulate Commerce takes no account of how carriers make or divide charges. Its provisions apply to the aggregate amount of such charges when made, and aggregate charges are proper and necessary matters for comparison in cases involving the relation of rates to different points.

The Party Rate Case.

This was a case of alleged unjust discrimination by the Baltimore and Ohio Railroad Company in issuing party-rate tickets for ten or more persons traveling together in one body on one ticket at a rate per mile for each person less than was charged to the single passenger traveling between the same points at the same time. The Commission had declared that the sale of party-rate tickets at a reduced rate *per capita* subjected single passengers to unjust discrimination, and that the party-rate ticket at reduced rates was illegal. In a proceeding to enforce the Commission's order in the United States circuit court, southern district of Ohio, this ruling of the Commission was not sustained. In treating of the second section, which, like the fourth section, contains the phrase "under substantially similar circumstances and

conditions," Judge Jackson said: "When the traffic is not of like kind, or when the service is not like and contemporaneous, or when the transportation is not rendered under substantially the same circumstances and conditions, differences in charges do not constitute unjust discrimination." The substance of the decision rendered by Judge Jackson in this case is that in the absence of a showing of damage or undue prejudice to the single passenger unjust discrimination cannot be predicated upon the allowance of reduced rates to parties of ten or more persons. He also held that the party-rate ticket comes within the terms "commutation ticket," the issuance of which is specially permitted by section 22 of the statute.

Judge Sage, in a separate opinion, in considering what should be taken into account in considering whether the "circumstances and conditions" are similar or dissimilar, said: "Does it depend solely upon whether party-rate passengers and those holding single tickets occupy the same cars, have the same accommodations, and are traveling from the same point to the same destination? Is that the full meaning of 'similar circumstances and conditions'? The answer which the question itself seems to suggest is that the phrase has a much larger and comprehensive meaning, else Congress could not consistently have recognized mileage or excursion or commutation tickets, for all these trespass upon the narrow ground on which the contrary view rests. To give the act its proper interpretation the phrase must be held to include circumstances and conditions affecting the business interests of the carrier and of its patrons; or, in other words, circumstances and conditions of a commercial character which,

"while they should not exclude or override the consideration of what is just and reasonably advantageous to those not so situated as to be able to avail themselves of the reductions offered to the general public, should be so recognized as not to be prejudicial or unjust to any, and yet, upon the whole, to promote in the interest of all concerned the beneficial operation of the act."

The Interstate Commerce Commission *v.* Baltimore and Ohio Railroad Company, 43 Fed. Rep., 37.

This was precisely the intention of Congress in adding the proviso clause to the fourth section, namely, to promote the interests of all concerned the beneficial operation of the act.

This case was appealed to the Supreme Court and decided in May, 1872. The opinion of the Court, delivered by Mr. Justice Brown, has, because recognizing in a limited sense the principle of wholesale in railroad transportation, been seized upon by counsel for carriers in cases brought under the act as authority for a variety of gross discriminations. The following phrase in the opinion is also especially relied upon by such carriers: "It (the act) was not designed, however. to prevent competition between different roads." In making use of this sentence in the opinion they take no account of the preceding statement in regard to evils which existed prior to the passage of the law: "These evils ordinarily took the shape of inequality of charges made or of facilities furnished, and were usually tolerated for the promotion of the interests of officers of the corporation or for the corporation itself or for the benefit of some favored persons at the expense of others or for some particular locality

or community or for some local trade or commercial connection or for the destruction or crippling of some rival or hostile line."

Interstate Commerce Commission *v.* Baltimore and Ohio R. Co., 145 U. S., 263.

The Court said in reference to the Act to Regulate Commerce as compared with the English acts: "These traffic acts do not appear to be as comprehensive as our own, *and may justify contracts which with us would be obnoxious to the long and short haul clause of the act* or would be open to the charge of unjust discrimination. But, *so far as relates to the question of undue preference*, it may be presumed that Congress in adopting the language of the English act had in mind the construction given to these words by the English courts and intended to incorporate them into the statute." (Citing McDonald *v.* Hovey, 110 U. S., 619; Interstate Commerce Commission *v.* Baltimore and Ohio R. Co., 145 U. S., 263.)

The Supreme Court here makes a clear distinction between the undue-preference clause (which in our act is similar to the undue-preference clause of the English acts) and our second and fourth sections. In other words, McDonald *v.* Hovey applies in the construction of the undue-preference clause, but it does not apply to our second and fourth sections, which are more comprehensive than the equality clauses in the English acts.

The Tozer Case.

Tozer was indicted in the United States district court, eastern district of Missouri, for unjust discrimination and undue and unreasonable prejudice by charging the Hayward Grocery Company a rate of 46 cents per hundred pounds on sugar shipped from Hannibal, Missouri, to Hepler, Kansas, over the line of the Missouri Pacific Railway, whereas at or about the same date he, as agent for the Missouri Pacific, charged the Chicago, Burlington and Quincy Railroad for the transportation of sugar between the same points and over the same line at the rate of only 34 cents per 100 lbs. The 34-cent rate was the Missouri Pacific Company's share of a joint rate of 51 cents from Chicago to Hepler. The 46-cent rate was the Missouri Pacific Company's local rate from Hannibal to Hepler. Tozer was convicted in the district court (U. S. *v.* Tozer, 37 Fed. Rep., 635). On appeal to the circuit court Brewer, circuit justice, reversed the judgment of the lower court upon the ground that a comparison between a local rate of one company *and the share which it receives by agreement out of a joint through rate made by itself and another company*, the two being unequal, *is improper*. The opinion in this case shows the distinction between aggregate rates and proportions of aggregrte rates. It states: "Because the local rate is in excess of the share of the joint rate it does not follow that an undue preference or advantage has been given."

Tozer *v.* U. S., 52 Fed. Rep., 917.

This was the substance of the decision of the Supreme Court in the case of Union Pacific R'y Co. *vs.* U. S., 117 U. S., 355, and though rendered before the Act to Regulate Commerce took effect it has been followed by the courts and the Commission in deciding cases under the act. But neither the Commission nor any court, until the decision of the court of appeals in the Osborne case, *ante*, has held that it is improper to compare a total joint rate with any rate which may be complained of.

The False Billing Cases.

In the case of The United States *v.* Howell *et al.*, 56 Fed. Rep., 21, the court said with reference to unjust discrimination generally: "The shipper, and especially the large shipper, has a great interest to induce him to get a discrimination in rates in his favor, to get an 'under-rate,' as it is called, and the man who gets a discrimination in his favor in the shipment of his freight, especially if he is doing a large business, seeks thereby a large personal benefit to the detriment of his rival in a small business, and by the same process works injury to business all over the country, whether he be a lumberman, a wholesale groceryman, or a large shipper." The defendants were convicted.

Edmondson was indicted in 1890 in the United States district court, eastern district of Missouri, for false billing certain shipments of lime. He pleaded guilty and was fined.

U. S. *v.* Edmondston, 33 I. C. Rep., 639.

One McCormick was indicted in the United States district court, district of Maryland, for falsely billing sixty

cases of bitters by representing them to be sixty cases of mineral water. The defendant was tried and convicted.

U. S. *v.* McCormick. 3 I. C. Rep., 639.

In each of these false-billing cases the shipments were over connecting roads, and the indictment in each case specified that the roads *were engaged in transportation between interstate points, under a common arrangement for continuous carriage*, and in the case of McCormick the transportation was by a route which was part rail and part water.

The Case of Egan et al.

This was an indictment for selling 5,000 passenger tickets, each good for one first-class passage and transportation from Minneapolis to Chicago for less than the rate scheduled, published, and posted in the proper places and filed with the Interstate Commerce Commission.. The defendants were acquitted because the tariff of the company failed to specify what was meant by "first-class limited tickets," and, the tickets sold being limited to continuous passage, this was held to render such a ticket a limited ticket and to distinguish it from an unlimited first-class ticket.

U. S. *v.* Egan *et al.*, 47 Fed. Rep., 112.

This case is mentioned as illustrating one of the very many circumstances and conditions arising upon the company's own line which may create a dissimilarity in the circumstances and conditions under which the transportation is rendered by the carrier.

Cases of Reasonable Rates.

In the case of The Florida Fruit Exchange against The Savannah, Florida and Western Railroad Company, brought in the United States circuit court, northern district of Florida, to enforce an order of the Commission requiring a reduction of rates upon oranges from Florida points to Northeastern cities, the Commission's order was sustained. In this case the Commission prescribed a maximum rate, basing it upon rates in force prior to November 23, 1890, and the court held that such action on the part of the Commission was proper.

Florida Fruit Exchange *v.* Savannah, Florida and Western Railway Company, 4 I. C. Rep., 400.

This decision has been affirmed by the Circuit Court of Appeals, Fifth Judicial Circuit.

Savannah, Florida and Western Railway Company *v.* Florida Fruit Exchange, 4 I. C. Rep., 589.

In the case of Interstate Commerce Commission against The New York, Philadelphia and Norfolk Railroad Company and others the United States circuit court for the eastern district of Virginia held that the rates in controversy were not unreasonable. This proceeding was brought and conducted on behalf of citizens of the eastern peninsula of Virginia and had reference to only one branch of the case.

Interstate Commerce Commission *v.* New York, Philadelphia and Norfolk Railroad Company. (Not reported.)

In the case of the Interstate Commerce Commission *v.* The Lehigh Valley Railroad Company, 49 Fed. Rep., 177, the opinion of Acheson, circuit judge, merely decides a pre-

liminary question and does not go into the merits of the case at all. The conclusion is that "in view of the denials and averments of the answer the present motion must be denied, but without prejudice to the right of the petitioner to file a replication, and it is so ordered."

Cases Relating to Through Routes and Through Rates and Facilities for the Interchange of Traffic.

The first case of this character decided by a Federal court was that of The Kentucky and Indiana Bridge Co. *v.* Louisville and Nashville R. Co., 37 Fed. Rep., 567.

In this case Judge Jackson holds that "arrangements in respect to through freight traffic and joint through rates or charges, as well as the forms of bills of lading and the apportionment to be made of such joint traffic rates and of losses or damage to freight in the course of transit, *are all matters of private arrangements.*" He further says: "In the absence of through traffic arrangements between two railroad companies the one has the right to treat freights tendered to it by the other as local business, and to charge for the transportation thereof its local rates to destination, and in doing so no discrimination is made against the other company on the traffic it carries; nor does the company charging local rates on such freights make or give any undue or unreasonable preference to the other line or to the traffic they handle with whom it has agreements for through routing, and have through joint rates which may be lower than its local rates to the same points, because the service in the two cases is not the same or identical." But the distinction should be borne in mind that in this case the complainant sought to compel the defendant road to join with it in making a through route and

through rates, and alleged that it discriminated against it in favor of another company. There is nothing in the foregoing decision of Judge Jackson which covers a case where the through route and through rates actually exist and the companies together charge more for a shorter than for a longer distance over the connected roads.

The next case is that of Little Rock and Memphis R. Co. *v.* St. Louis, I. M. and S. R. Co. *et al.* (41 Fed. Rep., 559). It was there held that a court of equity has no power either at common law or under the Interstate Commerce Act to compel a railroad company to enter into a contract with another company for a joint through rate or joint through routing of freight and passengers. This decision was followed by Judge Hammond in the case of Little Rock and Memphis R. Co. *v.* East Tennessee, Virginia and Georgia R. Co. (47 Fed. Rep., 771).

The case of The New York and Northern Railway Company *v.* The New York and New England Railway Company (50 Fed. Rep., 867) was decided against the defendant company. In that case the physical conditions for interchange of traffic by the defendant and complainant companies, and also by the defendant and Housatonic road, the favored line, were substantially equal, and it was therefore held that the requirements of the second clause of the third section of the act were plainly applicable, and there should be no "discrimination between the connecting lines."

Upon the disposition of carriers to evade responsibility under the act in the matter of continuous carriage and provision of proper facilities the court held:

"The respondent has restored the joint through tariff and has also desisted from refusing to accept freight on through bills, but has so arranged the running of its trains that the facilities for interchange, forwarding and delivering are (as is alleged) substantially no better than before and not equal to those afforded to the competing lines. The respondent contends, however, that such acts may not be shown before this court acting summarily, under section sixteen, in review and enforcement of the order of the Commission because no question of the hours of running trains was presented to the Commission. It is manifest that equal facilities may be refused quite as much in one way as in the other, and both grounds of complaint relate to the subject-matter of physical interchange and prosecution of traffic instead of to a discrimination in rates. To refuse altogether to receive traffic from one connecting line; to receive it only under arrangements which imposed such obligations upon the shippers as to transfer and rebilling as would make the transaction of the business impracticable in competition with a more favored line; to receive it without reshipment and transfer, indeed, but to systematically neglect to forward it; to receive and forward it, but to so arrange the hours or manner of delivery as to deprive it of facilities equal to those afforded to traffic coming from the competitor—these and a great variety of other devices which might be suggested, while differing some in detail, are in substance practically the same. *To require petitioner to bring a new proceeding each time the ingenuity of the offending carrier may devise some slight variation of the methods by the means of which its violation of the statute is persisted in would be to fritter away the system of procedure provided in the statute to secure obedience to its requirements.* The order of the Commission was no broader than the petition and proofs before them warranted, and this court may properly investigate the charge that respondent is disobeying the requirements of such order by acts and omissions in substance the same as those considered by the Commission, directed to the same ends, and accomplishing precisely the same result."

In the case of The Oregon Short Line and Utah Northern Railroad Company *v.* Northern Pacific Railroad Company,

(3 I. C. Rep., 205) Judge Deady granted a temporary injunction to compel the defendant to interchange freight with the complainant at Portland, Oregon. One feature of the decision of Judge Deady was that "one railroad company has a right to issue bills of lading for freight and through tickets for passengers over a connecting road, although there is no contract between the companies."

But Judge Jackson, in the Kentucky and Indiana bridge case, *ante*, held "that no authority is conferred upon common carriers of interstate commerce to issue through tickets to passengers or through bills of lading for property at through rates over connecting lines in the absence of such *arrangements* between the companies."

When the Oregon Short Line case came on for hearing in the circuit court, Mr. Justice Field held with Judge Jackson that a railroad company is under no obligation to honor tickets of passengers over its line issued by another company in the absence of an arrangement between them. He said "that the practice of railway companies operating connecting lines to honor tickets or coupons for passage over their respective lines issued by a connecting company, which is very general, is founded entirely upon arrangement between the connecting companies."

The Oregon Short Line and Utah Northern R. Co. *v.* Northern Pacific R. Co., 51 Fed. Rep., 465.

It seems clear, then, both upon the authority of Judge Jackson in the Kentucky and Indiana bridge case and that of Mr. Justice Field in the Oregon Short Line case, that where the through ticket or bill of lading is issued at one through charge for continuous carriage over connecting

lines, and the continuous carriage is actually performed, that the arrangement must in every case be presumed.

In the Session Laws of Colorado, 1885, page 309, it is provided as follows:

The Goodridge Case.

"*No railroad corporation shall, without the written approval of said commissioner*, charge, demand, or receive from any person, company, or corporation for the transportation of persons or property, or for any other service, a greater sum than it shall, while operating under the classification and schedule then in force, demand or receive from any other person, company, or corporation for a like service from the same place *or upon like conditions and under similar circumstances*, and all concessions of rates, drawbacks, and contracts for special rates shall be open to and allowed all persons, companies, and corporations alike, at the same rate per ton per mile, *upon like conditions and under similar circumstances, except in special cases designed to promote the development of the resources of this State, when approval of said commissioner shall be obtained in writing*," etc.

In the case of Union Pacific R'y Co. *v.* Goodridge, the United States Supreme Court, construing the foregoing statutory provision in an opinion by Mr. Justice Brown, decided as follows:

1. The law of Colorado of 1885, prohibiting railroads from charging one personal corporation a greater sum than it charges any other for a like service, was intended to put all shippers on an absolute equality, saving only a power in the railroad commissioner to except special cases.

2. It is no proper business of a common carrier to foster particular enterprises; it is bound to deal fairly with the public, to extend to them reasonable facilities for the transportation of their persons and property, and to put all its patrons upon an absolute equality.

3. That a particular company is allowed by a railroad less rates than other shippers are required to pay upon considerations which are satisfactory to the railroad, is no answer to a complaint of unlawful discrimination under the Colorado law of 1885.

4. It is not a justification for a violation by a railroad company of the Colorado law of 1885 by charging one coal company less rates for transportation than it charged plaintiffs that it was done in consideration of the coal company selling coal to such railroad for its own use at a certain price, and of the compromise and settlement of a claim of the coal company against the railroad company.

5. Under the Colorado law of 1885 the right of a railroad to charge a certain sum for freight does not depend at all upon the fact whether its customers are making or losing by their business.

6. In an action against a railroad company under the Colorado law of 1885 to recover the amount paid defendant for freight on coal over and above what is charged another for the like service plaintiffs are entitled to recover as damages the amount to which such other was given the preference. Whether plaintiffs lost profits upon the sale of their coal by reason of the non-allowance of such rebates as were given to another on freight is too remote to be made an element of their damages.

Union Pacific R'y Co. *v.* Goodridge, 149 U. S., 680.

The following extract is taken from Mr. Justice Brown's opinion in that case:

"This act was intended to apply to interstate traffic the same wholesome rules and regulations which Congress two years thereafter applied to commerce between the States, and to cut up by the roots the entire system of rebates and discriminations in favor of particular localities, special enterprises, or favored corporations, and to put all shippers on an absolute equality, *saving only a power, not in the railroad company itself, but in the railroad commissioner, to except 'special cases* designed to promote the development of the resources of this State,' and not to prevent the

commissioner 'from making a lower rate per ton per mile, in car-load lots, than shall govern shipments in less quantities than car-load lots, and from making lower rates for lots of less than five car-loads than for single car-load lots.' The statute recognizes the fact that it is no proper business of a common carrier to foster particular enterprises or to build up new industries, but deriving its franchise from the legislature, and depending upon the will of the people for its very existence, it is bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, and to put all its patrons upon an absolute equality. Citing Scofield *v.* Lake Shore and M. S. R. Co., 43 Ohio St., 571; Sanford *v.* Catawissa, W. and E. R. Co., 24 Pa., 378; Messenger *v.* Pennsylvania R. Co., 36 N. J. L., 407; McDuffee *v.* Portland and R. R. Co., 52 N. H., 430."

It is to be observed that the statute above set forth contains the phrase "upon like conditions and under similar circumstances," but notwithstanding the presence of the phrase in this section, *the Supreme Court holds that no deviation from the principle of equality is permissible except upon approval of the railway commissioner.* The rule of the fourth section is also qualified by the phrase "under substantially similar circumstances and conditions," but Congress added, nevertheless, a proviso authorizing the Interstate Commerce Commission to relieve carriers from the operation of the long and short haul rule in special cases. This construction of a similar statute by the highest court would seem to be conclusive upon the question whether competition or "other considerations which are satisfactory to the railroad" create dissimilarity in the circumstances and conditions. Such considerations were not deemed to constitute a dissimilarity under the equality clause of the

Colorado law and it should not be held to create such dissimilarity under the fourth section of the Federal law.

Union Pacific R. Co. *v.* Goodridge, 149 U. S., 680.

The Mobile Cotton Case.

The case of Bigbee and Warrior Rivers Packet Company *v.* Mobile and Ohio Railroad Company *et al.*, 60 Fed. Rep., 547, decided, under the act to regulate commerce, by the United States circuit court for the southern district of Alabama, shows an instance of rather extreme discrimination. The roads had an established rate on cotton from Mobile to New Orleans which they charged on local shipments, but on cotton offered to them at Mobile by the plaintiff packet company for carriage to New Orleans, they demanded a rate much higher than that in force on local shipments between the same points. This was done to discourage shipments by the packet line from the original shipping point, which in this case was Demopolis, Ala., and thus throw the whole carriage to the railroads. The carriers set up the plea of "dissimilar circumstances and conditions," but the court held that all goods offered for shipment at a given point must be carried at the established rate for such goods from that point, regardless of the place from where they originate, citing and quoting from Union Pacific R'y Co. *v.* Goodridge, *ante*. The following extract from the opinion sets forth a principle which has been frequently announced by the Commission:

"There is a dissimilarity in the circumstance that one lot of cotton came from one point and the other lot from another point. But this is not a substantial dissimilarity, such as is contemplated by the law, and it is not every dissimilarity

of circumstance or condition that justifies a dissimilarity of rates. 'That some dissimilar conditions justify dissimilarity in rates is true. That remote dissimilarities of condition justify any dissimilarities which the carrier chooses to make is not true.' (Interstate Commerce Commistion *v.* Texas & Pacific Railway Company, 6 C. C. A., 653; 57 Fed. Rep., 955.) The circumstances and conditions to be considered are those which bear upon the transportation by the particular carrier, and under which such transportation is conducted. They must have direct bearing upon the traffic over the line on which the discrimination is made. The dissimilarity of circumstances and conditions set up by respondent in justification of its claim is not the outcome of competition by water routes or another competitive railroad line not subject to the interstate commerce act. Respondent's position on this point can not be sustained."

The Following Cases are Cited in the Decisions Above Discussed.

Boyle *v.* P. & R. R. Co., 54 Pa., 310, and Lake Superior and M. R. Co. *v.* U. S., 93 U. S., 442, upon the point whether the complainant, a bridge company, was a common carrier. K. & I. Bridge Co. *v.* L. & N. R. Co., 37 Fed. Rep., 567.

Shelbyville R. Co. *v.* Louisville, &c., R. Co., 82 Ky., 541; Atchison, &c., R. Co. *v.* Denver & N. O. R. Co., 110 U. S. 681; upon the point that a section of the respondent's charter authorizing other railroads to make connections with its line of road refers merely to a physical and not a business connection requiring an interchange of traffic at the point of junction. K. & I. Bridge Co. *v.* L. & N. R. Co., 37 Fed. Rep., 567.

Atchison, Topeka & Santa Fe R. Co. *v.* Denver & N. O. R. Co., 110 U. S., 681, and Dubuque and S. C. R. Co. *v.* Richmond, 86 U. S., 584, as against the contention that the

act of June 15, 1866, conferred upon carriers the right to a through route and a joint through rating. K. & I. Bridge Co. *v.* L. & N. R. Co., 37 Fed. Rep., 567.

Union Pacific R. Co. *v.* U. S., 117 U. S., 255, upon the point "that the service rendered by a railway company in transporting a local passenger from one point on its line to another is not identical with the service rendered in transporting a through passenger over the same route." K. & I. Bridge Co. *v.* L. & N. R. Co., 37 Fed. Rep., 867. This, as hereinbefore pointed out, means merely that comparison of a local rate with the carrier's share of a through rate is improper. It does not extend to the comparison of total rates, which is proper.

Chicago, M. & St. P. R. Co. *v.* Minnesota, 134 U. S., 418, upon the right of defendant to make and collect reasonable charges for its service, and of which it cannot be deprived without due process of law. I. C. C. *v.* B. & O. R. Co., 43 Fed. Rep. 37.

Hayes *v.* Pennsylvania Co., 12 Fed. Rep., 309, as to discriminations in rates according to quantity shipped. I. C. C. *v.* B. & O. R. Co., 43 Fed Rep., 37,

Union Pacific R. Co. *v.* U. S., 117 U. S., 355. Same as cited above. I. C. C. *v.* B. & O. R. Co., 43 Fed. Rep., 37.

Ragan *v.* Aiken, 9 Lea, 609; Scofield *v.* L. S. & M. S. R. Co., 43 O. St., 571; Johnson *v.* P. & P. R. R. Co., 16 Fla., 623; McDuffie *v.* P. & R. Co., 52 N. H., 430; Killmer *v.* New York Central, &c., R. Co., 100 N. Y., 395; Shipper *v.* Pa. R. Co., 47 Pa., 338; Christie *v.* M. P. R. Co., 94 Me., 453; Bayles *v.* K. P. R. Co., 2 I. C. Rep., 643; Root *v.* L. I. R. Co., 114 N. Y., 300, in support of the view that the service rendered in transporting a party of ten or more passengers is not under substantially similar

circumstances and conditions with those applying to the transportation of single passengers. I. C. C. *v.* B. & O. R. Co., 43 Fed. Rep., 37. The general doctrine of these cases is in nowise contrary to the principle of strict regulation. Some were decided under the common law; others under variously worded statutes. Ragan *v.* Aiken discussed the *condition of the shipper* rather than the *conditions under which the transportation was conducted.* In Johnson *v.* Pensacola there was a defect in pleading, and the court intimated that if there had been an allegation of "like service under similar conditions" a different result might have been reached. McDonald *v.* Hovey relates to the construction of statutes.

Atchison, &c., R. Co. *v.* Denver, &c., R. Co., 110 U. S. 637; Pullman Palace Car Co. *v.* Missouri Pacific R. Co., 115 U. S., 587; the Express Cases, 117 U. S., 13, upon the question of through routes and through rates. Little Rock & Memphis R. Co. *v.* St. Louis, I. M. & S., 41 Fed. Rep., 559.

Fitchburg R. Co. *v.* Gage, 12 Gray, 393; *Ex parte* Benson, 18 S. C., 38; Johnson *v.* P., &c., Co., 16 Florida, 623, upon the duty of common carriers at common law to make the same charge to all persons for the same service. "The weight of authority in this country was in favor of equality of charge to all persons for similar services." (I. C. C. *v.* B. & O. R. 145 U. S. 263).

McDonald *v.* Hovey, 110 U. S., 619, upon construction of statutes; I. C. C. *v.* B. & O. R. Co.; 145 U. S., 263.

Union Pacific R'y Co. *v.* Goodridge, 149 U. S., 680, upon the questions of discrimination and construction. Bigbee & W. Rivers P. Co., *v.* M. & O. R. Co., 60 Fed. Rep. 547.

Decisions of State and Federal Courts.

The following decisions, not hereinbefore cited, are

among those which involve the duties of carriers under variously worded statutes and at common law in respect of long and short hauls, unjust discrimination, and reasonableness of rates:

Indianapolis, D. & S. R. Co. *v.* Ervin, 118 Ill., 250;
Messenger *et al. v.* Penn. R. Co., 36 N. J. Law 407;
Burlington, C. R. & N. R'y Co. *v.* N. W. Fuel Co., 31 Fed. Rep., 652.
Menacho *et al. v.* Ward *et al.*, 27 Fed. Rep., 529;
Munhall *v.* Penn. R. Co. *et al.*, 92 Pa., 150;
Texas Exp. Co. *v.* Tex. & Pac. R'y Co., 6 Fed. Rep. 426;
Osgood *v.* Concord R. Co., 63 N. H. 255;
Vincent *et al. v.* C. & A. R. Co., 49 Ill., 33;
People *v.* W. St. L. & P. R'y Co., 104 Ill., 476; see also this case by U. S. Sup. Ct., 118 U. S., 557;
C. & A. R. Co. *v.* People, 67 Ill., 11;
Ill. Cent. R. Co. *v.* People, 121 Ill., 304;
Paxan *v.* Ill. Cent. R. Co., 56 Iowa, 427;
Houston, &c., R'y Co. *v.* Rust, 58 Tex., 98;
Shipper *v.* Pa. R. Co., 47 Pa., 338;
New Eng. Exp. Co. *v.* M. C. R. Co., 57 Me., 188;
Samuels *v.* L. & N. R. Co., 31 Fed. Rep., 57.

State and Interstate Commerce.

When commerce begins to move from one State to another it becomes interstate traffic. (Gibbons *v.* Ogden, 9 Wh., 1; Brown *v.* Maryland, 12 Wh., 419. The Daniel Ball, 10 Wall., 565; Coe *v.* Errol, 116 U. S., 230, and many other authorities which need not be cited.) It is well settled that the characteristic which distinguishes commerce as being State or interstate is its movement.

When interstate commerce is carried by connecting carriers under a through bill of lading at one charge, both the shipment and the carriage are continuous, and an arrangement for such continuous shipment or carriage is presumed.

K. & I. Bridge Co. *v.* L. & N. R. Co., 37 Fed. Rep., 567; Oregon Short Line, etc., R. C. *v.* Northern Pacific R. Co., 51 Fed. Rep., 465; Richardson *v.* The Chouteau, 37 Fed. Rep., 532; Harp *v.* The Grand Era, 1 Woods, 184.

Although the decisions of the Interstate Commerce Commission have been very frequently referred to and cited by Federal and State courts in cases involving transportation questions, no statement of principles laid down by the Commission is included herein, the Commission being the appellee in the case before the court ~~of appeals~~ in which this review is to be used on its behalf. The decisions of the Commission are fully reported in "Interstate Commerce Commission Reports," published in New York city, N. Y., and in "Interstate Commerce Reports," published in Rochester, N. Y.

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[Analysis of English cases referred to in appellee's brief in the case of The Cincinnati, New Orleans and Texas Pacific R. Co. *et al.*, appellants, *v.* Interstate Commerce Commission, and cross appeal, Supreme Court of the United States, Nos. 729 and 832.]

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EXTRACTS

FROM

PARLIAMENTARY REPORTS

RELATIVE TO

LONG AND SHORT HAULS.

THE ENGLISH CASES.

REPRINTED WITH ADDITIONS.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
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PARLIAMENTARY REPORTS RELATIVE TO LONG AND SHORT HAULS.

REPORT OF COMMITTEE ON RAILWAY RATES—1881 AND 1882.

But for the competition introduced by the low rates given by railway companies, trades would be much more local, and the trader who was nearest the market would probably make a larger profit. But, on the other hand, this competition can not but be advantageous to the public; that Greenock sugar refiners should be in the same markets as the sugar refiners of London, while it may be a grievance to London refiners, must be an advantage to Greenock refiners, and can not be a disadvantage to buyers of sugar. It may be worth while to follow this out as a typical case: Thirty-nine towns in England to which sugar is sent are at an average distance of 292 miles from Greenock, and the same towns are at an average distance from London of only 150 miles. (Vol. 3, p. VIII.)

The rates for these distances from London and Greenock, respectively, are about the same, representing, in the case of the Greenock rate, 1.09*d.*, but in the case of the London rate, 2.13*d.* per ton per mile. *In other words, sugar from Greenock is, for the same sum, carried double the distance as sugar from London.* This enables Greenock to compete at these 39 towns, and this is what the refiners of London object to. The demand from London, therefore, is, that *either the rates for the longer distance should be raised, or those for the shorter distance reduced.* The effect of compliance with this demand would be to close some of these markets against Greenock sugar, to deprive the northern lines of a considerable portion of their trade, handing it over to the southern lines, and to give a practical monopoly to the London sugar refiners, who would be real gainers by the transaction. It does not appear to your committee that such a result would be either just or reasonable. (*Ib.*)

Mileage rates would prevent railway companies from making perfectly fair arrangements for carrying at a lower rate than usual goods brought in larger and constant *quantities, or for carrying for long distances at a lower rate (per mile) than for short distances.* (*Ib.*, p. IX.)

There is sea competition with railways "at about *three-fifths* of the railway stations of the United Kingdom. (*Ib.*)

The only fixed restriction affecting this question of relative charges which your committee are not prepared to say might not, without disadvantage, be imposed upon railway companies, would be a legislative prohibition against any company charging, unless with the express sanction of the railway commission, *a larger sum for the transportation of freight a shorter distance than they do for a longer distance* (not being part of a through rate) *on the same line and from the same original point of departure,* that is, if put in another way, that *no company may charge for transportation from the same point more to a way station than to a terminus.* This was the principle enunciated in Budd's case, which was decided, not by the railway commissioners, but by the court of Queen's Bench; and your committee believe that it has been embodied in laws passed by the Massachusetts legislature, and in some other States of the American Union. Its effect would be but small, but it would get rid of some anomalies of charge which appear to the public to be most glaring and burdensome. It might further be declared that the fact of a company working any portion of its traffic at a loss should of itself be held an "undue preference," because it is clear in such a case (if such a case exists), that the traffic of one man is being carried at the expense of another. (Chm. Ashley's Draft Report—*Ib.*, p. XXIX.)

In connection with this question of rates, complaint has been made by railway managers that the system of one "grouping" rate has been found to be illegal. According to the grouping system the railway company fixes one uniform rate between all stations within a certain area and another common point, although there is considerable difference in the distance between some of the stations and the common point. *The railway companies contend that, although it costs more to carry the longer distance than the shorter,* it is for general convenience to

have one uniform rate for the district, and that thereby competition is increased and the public benefited. (*Ib.*, p. XXXVII.)

The railway commissioners, following the precedents of the courts of law, have found the practice to constitute an undue preference, and *that a difference in the rates must be made corresponding to the difference in cost* to the company of performing the respective services. (*Ib.*)

In the case of grouping collieries and *charging all, irrespective of distance, the same rate*, not only is [are] the nearer collieries prejudiced, but also the general public. (*Ib.*)

If the railway company *is charging less for the longer distance than the fair rate*—that is, a rate based on the cost to the company of performing the service—the reduction, it is to be apprehended, does not fall on the railway shareholders, but on some other portion of the traffic. (*Ib.*)

If the rate is, as regards the most distant colliery, the fair and proper rate, it must be unduly high to the nearer collieries, and assuming the cost of getting the coals to be the same in both cases, the cost of the coal is unduly enhanced to the public by the amount the rate is in excess of the proper charge. (*Ib.*)

Railway managers defend the system of giving preferential rates on the ground that the public benefit by the increased competition thereby created. *No doubt the public benefit by increased competition where the competition is natural, but the competition called into existence by the policy of preferential rates is not natural, but artificial, as is proved by the existence of the preferential rates it is sought to defend;* and no individual or corporation, however powerful, can permanently maintain an artificial competition at its own cost. (*Ib.*)

NOTE—The following provision was inserted in the English act of 1888:

(3) The court or the commissioners shall have power to direct that no higher charge shall be made to any person for services in respect of merchandise carried over a less distance than is made to any other person for similar services in respect of the like description and quantity of merchandise carried over a greater distance on the same line of railway.

REPORT UPON PROCEEDINGS AT THE INQUIRY HELD BY THE BOARD OF TRADE, 1889–'90.

Special exception was taken to the graduation in rates proposed by the companies on the ground that *abnormal powers of charging were heaped upon short distance traffic* where they could be enforced (p. 3).

They (the railway companies) claim and exercise the right to vary their charges to any extent they please within the parliamentary maximum to favor one place, or one description of trade, at the expense of another; *to charge high rates for short distances and low rates for long distances*, or to charge two different rates for the same service, if they think it their interest to do so; and not only do they claim to exercise all these powers, but they refuse to tell the public how they exercise them or why they exercise them (p. 14, quoting from Report of 1872).

Inasmuch as the interest on the outlay at such stations, together with the wages of the staff of passenger porters, will very possibly be found to amount to 6*d.* per passenger, the argument of the companies is tantamount to a claim to add 1*s.* to each passenger fare, *long or short*, as payment for the right of access to the stations of arrival and departure (p. 44).

Group rates, for instance, are *ordered to be reasonable, and much greater facilities are afforded to enable towns to recover the benefit of their geographical position* in cases where the railway companies have thought fit, in the exercise of their all-seeing providence, to take it from them (p. 72).

Mr. Pope selects, as a supreme illustration of the iniquity of a scheme which should curtail the charging powers of a railway company, an examination of the cases of traffic passing between Bolton and Manchester, *distance 8 miles*, and of similar traffic between Bolton and Liverpool, *distance 28 miles*.

If, implies Mr. Pope's questions, 2*d.* per mile is a fair rate, and you do not see your way to reduce that rate as between Bolton and Liverpool, how can you possibly put Liverpool on the same footing (as regards Bolton) as Manchester *by charging the same rate for the 8 miles as you do for the 28* when you are limited to 2½*d.* per mile as your maximum?

The witness to whom this objection to the placing of reasonable limits on the charging powers of the companies was put as an insuperable obstacle admitted that his scheme did not provide for this contingency and that he would not be prepared to allow, *as a charge upon 8 miles, an amount which would be the maximum which the court should consider reasonable for 28*, and then it was that he drew down upon himself the accusation of advocating that long-exploded heresy of "equal mileage." Seventy-four questions (18226–18299) were put upon the point as to whether or not the scheme of the conference could be proved to be beyond the pale of orthodox inequality, but a reference to the minutes of proceedings will show that this is the one only case where the accusation launched was found to be justified (pp. 72–73).

The salient feature of the companies' schedules consists in the persistent efforts made, under one pretext or another, *to pile up accumulated charges on the short-distance traffic.*

No pains are spent *to place this traffic at the mercy* of the railway companies, and to leave it completely at their option either to consent to carry it, if nothing better can be done, or to destroy it, root and branch, *if its place can be taken by traffic coming from a longer distance* or from some foreign country (p. 73).

On reference to the London and Northwestern schedule, which, in this respect, does not differ materially from those of other companies, it will be noted that while for the "remainder of the distance" 1*d.* per ton per mile is deemed sufficient to afford an ample margin for Class B traffic, and 1¼*d.* for that of Class C (with somewhat higher amounts for distances of from 20 to 60 miles), *for short distances of 20 miles and under, 2d. per ton per mile instead of a 1d. is claimed for Class B, and 2½d. per ton per mile instead of 1¼d. for traffic in Class C* (p. 73).

In these cases the rate per ton per mile *is exactly doubled on short distances.* When the sums to which this would work

out are to be added the amounts claimed for station and service terminals, *the mileage rates demanded for short distance traffic seem to be out of reasonable proportion to those claimed for longer distances* (p. 73).

There are probably few parts of the country where the especial effect of such a system would be more hurtful *than in the manufacturing districts* of Lancashire, Cheshire, and Yorkshire (p. 74).

When every cost and service which railway ingenuity can imagine have been charged and paid for, whether rendered or not, at the highest possible price, the companies *still say that on short distance traffic the ordinary mileage rate is insufficient* (p. 74).

So long as the maximum allowed to be charged is simply a mileage rate, with an addition for loading and unloading only, as in the case with the limits provided in the great majority of the special acts, there seems reasonable grounds for making a difference in rates for long and for short distances (p. 75).

This is the rough-and-ready principle adopted in the London and North Western act of 1846, where manure, lime, bricks, etc., *are charged ¾d. per ton per mile more when the distance is under 15 miles than when carried longer distances*, and other traffic is subjected to an increased charge of ½*d.* per ton per mile when carried for distances under 50 miles (p. 75).

If in this instance the analogy of the passenger traffic, invoked by Sir Henry James, may be accepted as a guide, the practice of the companies would furnish a conclusive argument for the rejection of any extra charge. The passenger fares are, almost without exception, based on the same mileage rates for distance of 3 miles as for 300; *such exceptions as do exist are mainly on short-distance traffic rather than on long, as in the case of suburban districts* (p. 75).

The first-class fare, for example, from Manchester to Urmston and back, 10 miles, is 1*s.* The first-class fare from Manchester to London and back, say 370 miles, at this rate would be 37*s.* *But notwithstanding the alleged economy of long-distance traffic*, and the advantages which the public derive from the competition of four separate railways, the fares actually charged are not 37*s.*, but 49*s.* (p. 75).

Following the same analogy, it will be seen that the companies here also have *voluntarily introduced the principle of lower rates for larger quantities*; for, while a single passenger has to pay 49*s.* for his return journey to London, when arrangements are made by which passengers may be expected to travel by the train load the fare is reduced from 49*s.* to 10*s.* or 15*s.* In the same manner the companies advertise their willingness to make a considerable reduction, generally 50 per cent, when a party of ten, the equivalent of a truck load, will arrange to travel at the same time between the same two places under certain conditions indicated (p. 75).

To this it may be added that, even as regards goods traffic, the companies *do not in practice follow out their vaunted theory of charging higher rates upon short-distance traffic* when once the value of terminal services is calculated and eliminated. The figures of the Midland Company are conclusive upon this point. The table of their class rates, with terminals eliminated, and stating mileage conveyance charges only, was put in by them in support of their diagram, and it will be found amongst those appended hereto, but with extra columns inserted showing what the rate per ton per mile in each case is (p. 76).

When the witness in defense of the scheme put forward on behalf of the conferences *gives it as his opinion that no reason exists for increasing the average rate of 1½d. to 3d. for short-distance traffic*, his notion is held to be so preposterous that the court and the railway companies both agree that argument is wasted on so idle a proposition (p. 76).

It is hardly the duty of the advocates of the conferences to attempt to prove the negative of such a proposition. The conferences have asserted in their objections to the view that apart from terminal expenses, mileage charges may be expected to be the same for every mile of a journey whether it be long or short; if the London and Northwestern, in their desire to put an additional 2*s.* 6*d.* or 3*s.* per ton on the Lancashire traffic, assert the proposition that such a charge would not be more than covered by the extra cost of transit, the burden of proof is theirs, and it is for them to satisfy the court that their claim has some substantial basis (p. 77).

In support of their doctrine they assume, of course, without any suspicion of proof, that 10 trains of 100 tons traveling 20 miles each would cost 125 pounds (20,000 ton miles at 1½*d.*) more than one train of 100 tons traveling a distance of 200 miles, consecutively, *a cost that is 12s. 6d. per train mile more in the former case than in the latter* (p. 77).

In the same manner that this calculation was prepared and given in evidence to the royal commission on trade depression in 1886 the London and Northwestern might, had they been so minded, have produced some reliable estimate of expenditure *to show how much of the additional 125 pounds claimed by their schedules was really likely to be expended on the 10 journeys of 20 miles* (p. 77).

The Lancashire and Yorkshire, without apparently any intention of supplying this defect, but for the purpose of making out a special case of their own, state *that on their railway 33 per cent of the traffic (other than Class A) is carried for distances less than 20 miles, and that 80 per cent is carried for distances of less than 50 miles.* This information is vouchsafed with the object of satisfying the tribunal that they are entitled to even higher rates than the London and Northwestern Company (p. 78).

The Lancashire and Yorkshire make this statement under the impression that *they are troubled with an undue proportion of short-distance traffic;* but this most probably would be a fair sample of the traffic of Lancashire and Yorkshire generally, and throughout the country the difference would probably not be very striking (p. 78).

If, on such a matter as this, it is assumed that no evidence is required to satisfy the tribunal that extra charges of 2*s.* 6*d.* and 3*s.* per ton are properly due upon Lancashire traffic, and if the courts are willing to state that they know of their own knowledge *that increased mileage charges of 50 per cent fairly represent the increased cost of a mileage of 20 miles as compared with one of 60 miles*, and that nothing more is incumbent on the London and Northwestern witnesses than to remind the tribunal that the fact is so, there is no ground for surprise that the companies were enabled to conclude their case with the celerity which has earned for them the graceful encomiums of the court (p. 79).

One effect of the particular form adopted by the companies, as applicable to short-distance traffic, was referred to by Mr. W. A. Nicholls. Having pointed out how much the Manchester traffic would naturally be carried for short distances, the witness proceeded to say that, so far as market traffic was concerned, the goods coming into Manchester came very frequently *from longer distances, and as these longer-distance rates would be lower that would constitute an apparent advantage.* But in very many instances that advantage would be swept away in reality, because the goods would travel over more than one line (p. 80).

The short distance extra charges claimed by each separate company would then operate to make the total a great deal more. For example, on traffic in Class 1 coming to Manchester from a distance of 180 miles, this might well happen to pass over three separate railways. If it passed over one railway only, the first 60 miles would be charged at 12*s.* 6*d.;* the remaining 120 would be chargeable at 15*s.*, but if the remaining 120 miles were equally divided between two other railways, the charge tenable on them would amount to 25*s.*, and the total rate would thus be 37*s.* 6*d.* instead of 27*s.* 6*d.*, as the two remaining companies each value the extra cost to them of conveyance by a route belonging to three companies at 5*s.* per company (p. 81).

The committee of 1872 report that the case of the public is a strong one, and protest against the arbitrary use which the railway companies make of their monopoly. "They favor one place at the expense of another;" "they charge high rates for short distances and low rates for long distances;" "they charge two different rates for the same service;" and the committee are not surprised that the conduct of the companies has given rise to "discontent and suspicion." They advise the companies that, if they are dealing fairly, it is to their interest "to court observation and criticism, and to give the public all possible information," and they warn them that a continuance of their policy of concealment and favoritism may become dangerous to them. They, too, report that a public authority is needed to compel the railway companies to obey the law (p. 154).

The special feature of the proposed schedules of rates consist

in the *ingenious manner in which exceptional charges are accumulated on short distance traffic. The mileage rates, for example, on classes B and C are doubled for distances under 20 miles*, and, on a rough estimate, it is calculated that an additional 2*s.* 6*d.* per ton *above the general average is sought to be imposed upon the local traffic of towns* situated in the neighborhood of Liverpool, Manchester, Leeds, and Birmingham (p. 156).

An addition of 6*d.* per ton is the equivalent of an addition of 10 per cent to the gross goods revenue, and the companies are claiming in Lancashire an addition of five times that amount upon an extremely large proportion of the traffic. *Taking long and short haul traffic together, the average cost of a train would scarcely amount to 3s. per mile, the claim of the companies is to add about 12s. 6d. per train mile to compensate for the difference in the cost of running a train 200 miles consecutively and that of dividing the 200 miles into ten consecutive journeys.* The companies claim also to be allowed a large margin over what may be necessary at the present moment to provide a fair maximum, on the ground that the cost of coal and labor may advance in the future. As regards coal, figures supplied by Mr. Findlay on two different occasions show that an increase of 40 per cent in the cost of coal would add less than the one-hundredth part of a penny to the cost per ton mile, and would afford no justification for the margin demanded (p. 157).

THE ENGLISH CASES.

These cases are valuable (1) as showing the construction given to the phrases "goods of like description" and "under the same circumstances" (or under like circumstances) contained in what is known as the "Equality Clause" or section 90 of the act of 1845; (2) as showing how liberally in favor of the public English courts and commissions have construed the strict rule of the equality clause, and how strictly against the carriers they have construed the general and indefinite provision against undue preference or prejudice in section 2 of the act of 1854.

The following comparison of the above-mentioned English provisions with the second, third, and fourth sections of our act to regulate commerce will show at a glance that only the undue preference clause of the English act of 1854 and the undue preference clause of our act are similar. The phrasing of our second section is free from nearly all the limitations contained in the English equality clause, and our fourth section has no counterpart in any English law. The English commission may, however, under authority granted in the act of 1888 (a year or more after our law was passed), prohibit greater charges for shorter hauls.

COMPARISON OF ENGLISH AND AMERICAN STATUTORY PROVISIONS.

EQUALITY CLAUSE.	UNJUST DISCRIMINATION CLAUSE.
English act.	*American act.*
SEC. 90. Railway clauses act 1845. And whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudic-	SEC. 2. Act to regulate commerce, 1887. That if any common carrier subject to the provisions of this act shall directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a

ing or favoring particular parties, or for the purpose of collusively or unfairly creating a monopoly, either in the hands of the company or of particular parties; it shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special act contained, from time to time to alter or vary the tolls by the special act authorized to be taken, either upon the whole or upon any particular portions of the railway as they shall think fit; *Provided*, That all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile, or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, *passing only over the same portion of the line of railway under the same circumstances;* and no reduction or advance in any such tolls shall be made either directly or indirectly in favor of or against any particular company or person traveling upon or using the railway.

UNDUE PREFERENCE CLAUSE.

English acts.

SEC. 2. Railway and canal traffic act, 1854.

SEC. 11. Railway and canal traffic act, 1873.

* * * And no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

UNDUE PREFERENCE CLAUSE.

American act.

SEC. 3. Act to regulate commerce.

That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic *under substantially similar circumstances and conditions*, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

THE FOURTH SECTION OF THE ACT TO REGULATE COMMERCE.

That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate *for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance;* but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.

In our sections 2 and 4 we find the phrases "like kind of traffic" and "like kind of property" and the phrase "under substantially similar circumstances and conditions." Section 90 of the English act of 1845, the "equality clause," contains the words "goods of like description" and "under the same circumstances." Any English case construing these phrases is, of course, important in a case requiring the construction of similar phrases in sections of our own statute; but it is equally true that not every English case decided under the equality clause is applicable, for that clause contains other limitations from which our sections 2 and 4 are free.

THE BASIS OF THE ENGLISH CONSTRUCTION.

Railway and canal acts are to be construed strictly against the companies and liberally in favor of the public. *Parker* v. *G. W. Ry. Co.*, 3 Ry. Ca., 563; *Stourbridge C. Co.* v. *Wheeley*, 2 B. & Ad., 792.

In railway and canal acts, *where there is an ambiguity in a clause* imposing rates, tolls, or duties, that construction is to be adopted which is more favorable to the interest of the public and against that of the company. *Barret* v. *S. & D. Ry. Co.*, 1 Ry. Ca., 443; affirmed by H. of L., 11 Cl. & Fin .590 *Stourbridge C. Co.* v. *Wheeley*, 2 B. & Ad., 792.

Under the equality clause of 1845 (Sec. 90) the words "under the same circumstances," have been held in an unbroken line of cases not to refer to the occupation or business of the railway customer, *nor to the fact of his being a competitor of the railway.* These are the "packed parcels" cases. The complainants gathered up small parcels at a sending town, assorted them according to destination, packed them for each place in large packages, and shipped them to their agents for delivery to the consignees. The railways discriminated against these parcel gatherers or individual carriers in favor of the general public and of themselves. *Edwards* v. *G. W. Ry. Co.*, 11 C. B., 588; *Parker* v. *Same*, 11 C. B., 545; *Same* v. *Same*, 7 M. & G., 253; *Same* v. *Same*, 3 Ry. Ca., 563; *Same* v. *Same*, 6 E. & B., 77; *Parker* v. *B. & E. Ry. Co.*, 6 Ry. Ca., 776; *Crouch* v. *L. & N. W. Co.*, 7 Ry. Ca., 717; *Crouch* v. *G. N. Ry. Co.*, 9 Exch., 557; *Pickford* v. *G. J. Ry. Co.*, 10 M. & G., 399; *Baxendale* v. *G. W. Ry.*, 14 C. B., N. S., 1, affirmed Exchr. Ch., 16 C. B., N. S., 137; *Garton* v. *B. & E. Ry. Co.*, 30 L. J., Q. B., 273.

In *Great Western Railway* v. *Sutton* (L. R., 4, H. L., 226) it was held that the "circumstances" are *exhausted upon the carriage of the goods.* In other words, that the word "circumstances" refers to the actual transportation and incidental services and has no reference to the occupation or situation of shippers or the existence of railway or other competition. For a clear and definite construction of the word "circumstances" and the phrase "goods of like description" see this case.

A railway charged more on local passenger traffic between two points than the pro rata charge between the same points on through passenger traffic to a longer distance point: *Held*, That the transportation was not a violation of the English act, it being a less charge per mile on through than on local traffic. *Atty. Gen.* v. *B. and D. J. Rwy.*, 2 Ry. Ca., 124.

To charge less per mile for greater distances is a common rule of transportation and its legality is well settled in the United States. There was no greater aggregate charge for the shorter distance in that case.

The defendant, a canal company, carried for plaintiff at a certain *rate per mile* and for others at another point at a lower

rate per mile. *Held*, That it was competent to charge proportionately less toll per ton per mile for a greater than for a less distance. *Strick* v. *Swansea Canal Co.*, 16 C. B. N. S., 245.

Like the foregoing case of *Attorney-General* v. *B. and D. J. Rwy.*, this sets forth nothing more than a common practice in this country, and one that our fourth section allows.

In the same case of *Strick* v. *Swansea Canal Company* it was also held competent for the company to agree to carry at a lower rate for a particular shipper in consideration of a large guaranteed minimum toll in order to enable them to enter into successful competition with a rival line of railway. Such a contract would not be legal in this country under the interstate commerce act or at common law. (*See Hays* v. *Pennsylvania*, 12 Fed. Rep., 309; *Providence Coal Co.* v. *P. and W. R. Co.*, 1 I. C. C. Rep., 107; also *U. P. Co.* v. *Goodridge*, 149 U. S., 680.) It should also be remembered that this decision was rendered under the canal company's act, and that it is at variance with later decisions under the railway acts of England.

Under section 2 of the railway and canal traffic act of 1854 competition of interest must be shown or the complainant must set forth personal disadvantage to himself, the mere statement that the complainant has frequent occasion to travel not being sufficient. *Hozier* v. *Caledonian Ry. Co.*, 1 N. & M., 27.

This was a passenger case involving a greater aggregate charge for passenger travel from Motherwell to Edinburgh or Glasgow than from Edinburgh, through Motherwell, to Glasgow, or in the contrary direction. There was no trial on the merits. The case was dismissed because the complainant failed to show any competition of interest or allege any disadvantage. This case, decided January 20, 1855, is the first one reported as tried under this clause, and there being no long and short haul statute rule, it was held that the failure to make out a case of prejudice was fatal. Later cases under this clause go farther and consider the public interest, thus practically overruling this case.

An affidavit was presented for a rule against a railway company to show cause why a writ should not issue enjoining it to grant Jones a season ticket between Colchester and London upon the same terms as it granted similar tickets to passengers carried between Harwich and London and through Col-

chester, but the court held that this was mere suggestion of undue preference and refused to grant the rule to show cause. There was no trial on the merits. *Jones* v. *Eastern Counties Ry.*, 1 N. & M., 45.

Jones' case, like that of Hozier, is practically overruled by later decisions.

A railway company sought to give one omnibus company the sole right to bring passengers to and from their station. This operated to exclude a competing omnibus line from entering the station yard, and a writ of injunction issued upon the ground of undue preference. *Marriott* v. *L. and S. W. Ry. Co.* (Jan. 30, 1857) 1 N. & M., 47.

In the case of *Beadell* v. *Eastern Counties Ry.* (1 N. & M., 56), another case of competing omnibuses, decided in June, 1857, public inconvenience was not shown and the rule was refused. (*See also Painter* v. *London and S. C. Ry.*, 1 N. & M., 58, and *Ilfracombe P. C. Co.* v. *L. & S. W. Ry.*, 1 N. & M., 61.)

Here follows a line of cases relating to the transportation of coal.

Coals came to Ipswich by sea from Northumberland and Durham and to Peterborough by rail from Yorkshire and Staffordshire. The railway company gave preferential rates to dealers at Peterborough for the carriage of coals to points at which it also delivered coals for the competing Ipswich dealer. The traffic from Ipswich and Peterborough to such common points of sale was carried in different directions. The complaint was against the practice of charging *greater mileage* rates, not *greater aggregate* rates for longer and shorter distances. The court held that the fair interests of the company might be taken into account, but those interests lost their weight in the face of the undue preference given to the Peterborough dealer and the undue prejudice inflicted upon the Ipswich dealer. *Ransome* v. *Eastern Counties Rwy.* (No. 1), 1 N. & M., 63.

It was the fact in this case that the railway company was interested in encouraging the traffic in coal from Peterborough; and it diminished its rates per mile from Peterborough as its line approached the sea at Ipswich. Peterborough appears to have been what is called in this country a competitive point, several railroads centering there, while Ipswich was served by but one system of railways. Ransome contended for *equal*

rates per mile, but the court held that the rule could not be made absolute in that regard, and that some allowance should be made for the fact that Prior & Co. furnished their own trucks while Ransome used those of the company. A writ did issue enjoining the company to desist from giving undue preference to Prior and to carry coals for Ransome on equal terms with Messrs. Prior, having due regard for any circumstances which render the cost of carriage less for one party than for the other. This appears to be the first case where railway competition was to any extent involved in the argument of counsel or considered by the court. While the element of competition was recognized, it was given no considerable weight, because Ransome, *on account of his nearer proximity to points of sale and therefore his natural advantage of location as related to distance*, was unduly prejudiced by rates which permitted the Peterborough dealer to overcome that advantage. The idea whether the company could advance Peterborough rates and retain the traffic from that point was not considered. The only point to which attention was given was whether rates from Ipswich as compared with those charged from Peterborough were too high.

The North Eastern Railway Company, from a desire to introduce northern coke into Staffordshire, made special agreements with different merchants for the carriage of coal and coke at a rate (per mile) lower than the ordinary charge. Held that under the undue preference clause a railway is justified in carrying goods for one person at less rates than that at which they carry the same description of goods for another, if there be circumstances which make the cost of carriage less to the railway company, but to merely make the special agreements on the ground of a desire to introduce a commodity into a section of country will not excuse a lowering of rates to such traffic which amounts to undue preference. The same rule allowed as in Ransome's case above cited. *Oxlade* v. *North Eastern Ry.*, 1 N. & M., 72.

See notes to this case to the effect that cases relied on by the court were actions at law, which might not admit of the wider considerations that "possibly would influence a tribunal in the decision of cases under the acts of 1854 and 1873." (*See also* observations to this effect in *Baxendale* v. *G. W. Rwy. Co.*, 14 C. B. N. S., 40.)

A railway company was threatened by the owner of extensive collieries, which he had at considerable expense connected with their line, that unless they agreed to carry his coals to W., the terminus of their line, at a certain rate, he would construct a tramway from his collieries to W., and so divert his coal traffic from their line altogether. The company entered into an agreement with him accordingly, under which they carried his coals at such rate, being a less rate than which they charged the proprietors of other collieries situate in the same district for the carriage of their coals over the same portion of the line. *Held*, that this was an undue preference within the railway and canal traffic act, 1854, sec. 2. *Harris* v. *Cockermouth, etc. Ry.*, 1 N. & M., 97.

Compare with *Strick* v. *Swansea*, *Jones* v. *Eastern Counties*, and *Hozier* v. *Caledonian*, *ante*, and note following extracts from argument as reported:

Manisty and Bovill, Q. C. for the railway, said:

"It is sworn that the loss which would accrue to the company from the withdrawal of the carriage of the Messrs. Fletcher's (Lord Lonsdale's tenants) coals would amount to *nearly one-third of their (the company's) entire revenue.*" (Cockburn, C. J.: "Can that be a justifiable reason for putting Lord Lonsdale's tenants upon a better footing than the rest of the public?") "The object is, not to enable Messrs. Fletcher to undersell the complainants, but to place the former upon the same footing as the latter." (Cockburn, C. J.: "Your argument would deprive a man of his natural advantages. Suppose a man residing at a place equidistant from two railways holds out to one of them that unless they will give him certain advantages he will travel by the other, would that be a reasonable thing for the company to be influenced by? There is hardly a railway in the kingdom where this might not occur.")

The substance of the foregoing colloquy between counsel and the chief justice is that competition *will not justify* a preference, and that the shorter-distance point is entitled to benefits arising from natural advantages of location. The case of *Hozier* v. *Caledonian Railway* was cited by counsel in support of the railway side of the controversy.

Complainant's counsel were not required to support the rule.

It is true that in this case Chief Justice Cockburn did say

the court had intimated, if not absolutely decided, that a railway company might consider competition of another railway. But in saying that and what followed he had entire reference to the cost of carriage. He said: "In respect of terminal traffic, as distinguished from intermediate traffic, it might well be they could *afford* to carry goods *over the whole line cheaper, or proportionately so*, than they could over an intermediate part of the line." In saying this he did no violence to his dicta, as above quoted, for he holds the basis of the exceptional rates down to cheaper cost. And all through this case of Harris the paramount interests of the public are recognized by the court.

In the second case of *Ransome* v. *Eastern Counties* he complained that the company had arranged the coal traffic from Ipswich so as to require a train load to each of three districts, while for Peterborough traffic there was but one district, thus requiring Ransome to send three train loads in order to avail of the rates to points served by him, while the Peterborough dealer needed to send but one train load in order to get the train-load rates from that point. He also complained that the new adjustment of coal charges from Ipswich and Peterborough still gave undue preference to the latter. The court held that the new rates did constitute undue preference, and granted a rule against the company, but refused to find undue preference in the arrangement of districts. This latter part of the decision was, however, stated in Ransome's case No. 4, to have probably been erroneous. *Ransome* v. *Eastern Counties Ry.* (No. 2), 1 N. & M., 109.

This case, like the first Ransome case, refers to *mileage rates* from two points, one a railroad center and the other a local seaport, served by one railroad. As in the first Ransome case, "the fair interests of the company" were not allowed to override the rights of the railway customer, and such fair interests were referred to cost of carriage.

Subsequently Ransome applied for an attachment against the company for disobedience of the writ of injunction, but it appearing that the company was making a *bona fide* endeavor to conform to the order the rule was refused. *Ransome* v. *Eastern Counties Ry.* (No. 3), 1 N. & M., 116.

There was some suggestion in this case of the proximity of rivers, canals, or other lines of railway entering into competi-

tion with defendant. The court said the rates have probably been settled in the earlier portion of the scale on this ground, and if this were altered, the alteration, so far from benefiting, *would materially prejudice the Ipswich dealer* (the complainant).

There are two cases reported entitled *Nicholson* v. *Great Western Railway*. The first (1 N. & M., 121) decides that a railway may enter into special agreements whereby advantages are secured to individuals in the carriage of goods when it clearly appears that the railway company have *only* the interests of the proprietors and the *legitimate* increase of the profits of the railway in view, and the consideration given them in return for the advantages offered by them is adequate, and the company are willing to afford the same facilities to all others upon the same terms. It was further held that carriage at a lower rate in consideration of a guaranty of large quantities and full train loads at regular periods was proper, provided the real object of the company be to obtain thereby a greater remunerative profit by *diminished cost of carriage*, although the effect may be to exclude from the lower rate those persons who can not give such a guaranty.

But this was a decision upon the affidavits of the parties under the rule to show cause. There was no inquiry into the merits, and when Nicholson made a new application (*See* 1 N. & M., 143), filing additional affidavits, the court of four judges was equally divided as to the propriety of referring the cause to a master.

These cases involved relative mileage rates on different branches of the same railway. There was no question in the case of similarity of circumstances for carrying over the same line.

Ransome, the Ipswich coal dealer, brought a fourth proceeding against the Eastern Counties Railway, this time alleging discrimination in favor of the Peterborough dealers through a stoppage of part of a 35-truck train load at C, when the whole was originally destined to another district, the rule being that a train load must consist of 35 trucks, or 200 tons. It appeared that Ransome was mistaken, that the company reduced the number of trucks in the train load at C for their own convenience, and that the full load did ultimately reach the district to which it was consigned. *Ransome* v. *Eastern Counties Rwy.* (No. 4), 1 N. & M., 155.

The second case of Oxlade holds, as was held in *Johnson* v. *Midland Railway*, (6 Ry. Ca., 61) that as a general rule railways are only bound to carry according to the profession they make, and, therefore, they might restrict their coal carriage from the pit's mouth to stations where colliery-owners have cells of their own, and decline to carry coal from station to station or for coal merchants—such arrangement being essential to the regulation of the large traffic in that article, and the company not being common carriers of coal. *Oxlade* v. *N. E. Rwy. Co.* (No. 2), N. & M., 162.

It was hardly necessary to mention this case. We have no such regulations in this country.

The next coal case relates to the exclusion of one coal dealer from station facilities for storing coal and the giving of an exclusive use thereof to another dealer. Strange to say, the court was equally divided as to whether a prima facie case of undue preference was made out by the affidavits in support of the application for a rule. So no rule was issued. It seems the doubt arose as to whether the peculiar station facility or wharf privilege sought by the application was within the act. *West* v. *L. & N. W. Rwy. Co.*, 1 N. & M., 166.

In the first part of this statement of English cases several decisions are presented involving the rights of individual carriers under the equality clause of 1845. The substance of those decisions, taken together, is, as hereinbefore stated, that the "same (or like) circumstances" contained in the equality clause do not refer to the trade or occupation of the shipper or consignee, and that the "circumstances" are exhausted upon the carriage of the goods.

We next find a list of carriers' cases brought under the undue preference clause of 1854. This provision merely prohibits undue preference or prejudice in general terms to any person, locality, or description of traffic. There is no reference in this clause to the "same or similar circumstances." Its language is as broad and general as that of the equality clause of 1845 is narrow and precise. Yet it will be found that the English courts adhered, even in cases under the undue preference clause, to the doctrine of construing and applying the regulating statute *liberally* in favor of the public interest.

A railway company operating a road from B to C advertised to convey goods from A to C (in conjunction with another company) at the rate of 50*s.* per ton, provided they were consigned from A to their own agents at the respective places; but if consigned through any one else they charged 2*s.* 6*d.* per ton more: *Held*, Ground for an injunction under the railway and canal traffic act of 1854. *Baxendale* v. *North Devon Railway*, 1 N. & M., 180.

Counsel for the company asserted that the inequality did not arise in the carriage along the North Devon Railway. Cockburn, C. J., said: "The whole is one charge. The North Devon Railway forms an integral part of the whole line; and unless the whole is justifiable the injunction must go." A writ in favor of plaintiff was granted, with costs.

A railroad company had been in the habit of unloading goods from trucks at places of destination, but they established a new rule under which they declined to allow their servants to unload the goods of C from their trucks without extra charge. They, however, continued to unload the goods of P, as these, from the smallness of their quantity, were not carried, like the goods of C, in separate trucks, but were mixed with the company's own traffic, and it was for the company's convenience that they unloaded them from the trucks. The court refused to rule enjoining the company to unload the trucks containing C's goods, but declared if C had previously complained to the company of their giving an advantage to P, who was a rival individual carrier, over him, in so unloading P's goods, and the company had not afterwards removed such ground of complaint, the court would have interfered to prevent the continuance of such undue advantage. It appears, therefore, that C's difficulty was with the form of his application. *Cooper* v. *London and South Western Railway*, 1 N. & M., 185.

It might or might not be considered ground of complaint in this country that a railroad company should unload less than carload lots and, at the same time, have a rule in force requiring shippers to unload traffic consigned to them in carload quantities. Yet the English court intimated that, while it would not require the company to unload their trucks, it might, if requested, compel the discontinuance of the preference to P by unloading free his less than truck-load quantity.

It is not a legitimate ground for giving a preference to one of the customers of a railway company that he engages to employ other lines of the company for the carriage of traffic distinct from and unconnected with the goods in question; and it is undue and unreasonable to charge more or less for the same service, according as the customer of the railway thinks proper or not to bind himself to employ the company in other and totally distinct business. *Baxendale* v. *The Great Western Railway*, Bristol case, 1 N. & M., 191.

It seems that the company carried goods between London and Bristol for one Somerville, a paper manufacturer, at a greatly reduced rate from that which was charged to Baxendale, an individual carrier, and to the public generally. Baxendale had formerly had the custom of Somerville, and sought to obtain a reduced rate from the company under the threat that if it were not allowed on Somerville's goods, consigned through Baxendale, Somerville's paper would be sent to Bristol from London by sea. The company refused the application, but afterwards entered into a special agreement with Somerville whereby he undertook to send all his goods by the Great Western to places reached by that line, stipulating for as low a rate as was charged to such points by other railways. Thus there is in this case water competition, railway competition, and unjust discrimination (as we call it) by reason of the special agreement. The undue preference allowed to Somerville over Baxendale was enjoined by the court.

It appears from the notices of argument that the court for the first time expressed a doubt as to the validity of these special agreements. Cockburn, C. J., said: "The legislature has taken upon itself to fix the maximum rates, and it has delegated to us the duty of seeing that the rates are imposed with due regard to the interest of the public, and equally. The object of the jurisdiction is to prevent these great monopolies from degenerating into abuse." "These special contracts seem to me to be very objectionable." Counsel for the company asked: "Is it illegal for a railway company to make special contracts?" Cockburn, C. J.: "I think it is very questionable. Here, for the purpose of competing with complainants, or rather depriving them of the trade, you carry for Somerville for about one-third less than you do for the complainant."

The railway counsel said that the validity of a special contract was allowed in Oxlade's case. Cockburn, C. J., replied:

"The question was not raised there, but I think it is one that is very deserving of consideration. Since the establishment of railways, there is no longer the wholesome competition which formerly existed between common carriers. *The railways have acquired a monopoly of conveyance.* The question is, whether the legislature has not intended to prevent these private arrangements, by requiring the exposure of the rates of charge."

Counsel for the company asked: "May not the company enter into a contract for a lower rate in respect of a larger quantity or a longer distance?" Williams, J.: "Subject to its being reasonable. *They must not swamp the retail dealers.*"

Counsel then said: "It is submitted that the statute gives the court no authority to interfere with the freedom of contracts between the company and their customers." Cockburn, C. J., said: "The question is, whether, in adjusting their rates of charge, the company are acting reasonably, or whether they are not pressing too hardly upon the small dealers. If the latter is subject to more prejudice than he ought reasonably to sustain, surely that is a matter that is within our province."

In this case counsel also cited that part of the decision in Ransome's case, which held that "the fair interests of the company were to be taken into account." But, as in other cases, the court did not allow "the fair interests of the company" to outweigh the rights of the railway customers to be kept free from undue prejudice.

In the opinion Willes, J., said: "The advantages stipulated for (by the company) are wholly distinct from and do not affect the price or profit of the carriage from Bristol to London, and they ought not to be taken into account in determining the charge for such carriage." It is thus seen that in this case the company was thrown back for any justification upon a showing of difference in the cost of carriage. This they could not do.

A railway company had no power to impose tolls for collecting and delivering goods, but did have power to make their own rates of charge for carriage. The plaintiff, Baxendale, was an individual carrier, that is, engaged in collecting parcels, sending them by the railway and delivering them at the place of destination from the railway station to consignees' places of business. The railway raised the charge for carrying between

R and P to 8*s*. 4*d*., being the aggregate of the former charge for carrying of 3*s*. 6*d*. and the charge for collecting, which had been made both by the company and Baxendale, of 4*s*. 10*d*., and it was intimated to the public that the company would collect and deliver goods free of all charge. The real purpose was to compel persons to employ the company to collect and deliver goods, and thus secure this business and the profits upon it to the company, as well as to exclude B from competing with the railway company in this department of business. It was held that this arrangement was an undue preference to the company in their separate capacity of carriers other than on the line of railway, and also an undue prejudice to Baxendale. *Baxendale* v. *The Great Western Railway* (Reading Case), 1 N. & M., 202.

Counsel for the company said: "Our affidavit shows that the company had no desire to prejudice complainants, but that their sole motive was to compete with the Southwestern Railway Company in the carriage between Reading and London."

Cockburn, C. J., said: "It might, *perhaps*, be a legitimate proceeding if the object of the company was *merely* to bring increased traffic on their line."

Counsel for the company also contended "that if the increased charge of 8*s*. 4*d*. is a reasonable charge for the carriage of the goods in question from Reading to London, whatever the consequence might be, the company are justified in enforcing it." "A preference to the company themselves is not a preference within the act." But the court took a different view.

In the opinion Cockburn, C. J., said, while treating generally of the subject of undue preference:

> Great difficulty and nicety perhaps arises in dealing with cases in which the purpose and effect of the thing complained of is the benefit of the company in their character of proprietors of the particular railway. In these cases the court might feel greater reluctance to interpose, partly from an unwillingness to interfere with parties in the management of their own affairs for their own advantage, partly from a disposition to give companies credit for acting on an enlightened view of their own interests as identified with those of the public; yet, if the court became clearly satisfied that a company was seeking to promote its own advantage by establishing an inequality which was unreasonable under the circumstances, and operated unfairly and injuriously upon particular individuals, or that it

was affording to one person or set of persons an advantage which it would not afford to another under similar circumstances, this court would not hesitate to interfere to prevent such a result, *although by so doing they might prevent the company from securing all the profit that it might otherwise derive from the use of its property.* Thus, where the complaint was that a railway company, as between the two intermediate stations, charged a higher rate than was due to the intermediate space in proportion to the charge made on the entire line of railway, this court, if it were made to appear that the disproportion was not justified by the circumstances of the traffic, in other words, was an undue prejudice or unreasonable disadvantage to those using the part of the railway in question, would interfere to set aside such arrangement.

The court further said:

This reasoning appears to us effectually to dispose of the argument that the court can not interfere to prevent a railway company from fixing the rates of tolls to be taken on its railway in such manner as shall best promote its own interests in cases where by so doing the company subjects others to unreasonable disadvantage or operates to their prejudice by giving undue preference to third parties.

The next case is where "a railway company charged certain rates for the conveyance of goods on their line from P to B, the charge including that of collecting and delivering the goods to and from the stations at P and B. The company, who had formerly allowed a deduction in respect of goods delivered and received at the P and B stations (as the expense of carting to and from said stations being thereby saved to the company), discontinued making such allowance in order to induce persons who sent goods by the railway to employ the company to collect and deliver such goods, and to exclude common carriers (that is, individual carriers) from competing in this with the company: *Held*, that though no profit was made by collecting and delivering the goods, the system of charge was an undue prejudice to those persons who did not wish to have their goods collected and delivered for them by the company." *Garton* v. *Great Western Railway Company*, 1 N. & M., 214.

The rule and the grounds on which it was applied for were similar to those in *Baxendale* v. *The Great Western Railway Company* above cited.

The court held in this case that even though the company made no profit upon the collection and delivery of goods the refusal to allow for collection and delivery by the individual

carrier, or by the shipper, makes "a man who has his own wagons and horses, and therefore does not require them to collect and deliver for him, pay more than he ought to pay for the transit on the railway. It is clearly a case of undue prejudice against the person not wanting the accommodation."

The next case, entitled *Garton* v. *The Bristol and Exeter Railway Company* (1 N. & M., 218), is similar to the Garton and Baxendale cases just cited.

Upon the subject of competition the court said:

The third objection is founded upon the special contracts entered into between the company and certain individuals, under which those persons have a preference over the complainants in the carriage of heavy packages of grocery and ironmongery between Bristol and Bridgewater. It is not, as it seems to me, necessary to decide upon the present occasion how far a railway may for their own advantage enter into special contracts of this sort. Nor is it necessary to say whether, with a view to meet competition by another railway company or other mode of carriage, the company may not say to persons having large quantities of heavy goods to send, "if you will engage to send a given quantity or to send all the goods you have to send by our line we will give you such an advantage." If that be done bona fide with a view to overcome opposition, and the public in general are offered the same advantages under like conditions, it is unnecessary to say whether that may not be allowable, *though I wish to guard myself against deciding that upon the present occasion.* The facts brought before us upon these affidavits fail to make out any adequate motive for this arrangement. It is suggested that there is certain water carriage which might enter into competition with the railways between Bristol and Bridgewater. But it is not shown that it actually does compete with it. We are not told what is the rate of charge for such water carriage as compared with the carriage by the railway.

The chief justice further said that in the absence of all explanation by the company as to the grounds of preference: "We can not come to any other conclusion than that the arrangement is made with a view to induce parties to engage with the company as carriers, directly to the exclusion of a rival carrier. I therefore think the rule must be made absolute."

In treating of this question of competition Willes, J., in concurring with the opinion of the lord chief justice, said:

I will only add, in consequence of the mention which has been made of the case of *Nicholson* v. *The Great Western Railway Company*, that it is a mistake to suppose that the court there intended to decide that a prima facie case of preference

is sufficiently answered by stating a difference which may or may not be material in the circumstances between the carriage for the person complaining and that for the person alleged to have been preferred, without showing that such difference practically affects the fair charge for carriage, to an extent proportionate to the difference of charge actually made by the company to their several customers.

The learned judge here held distinctly that, whatever the cause may be for giving the lower rate to a person or place, it must be shown that the resulting benefit to the company from decreased cost of carriage equals the difference in charge made to the complainant and the favored customer.

The next carrier's case is *Baxendale* v. *The London and Southwestern Railway Company* (1 N. & M., 231), where an injunction was granted against the company to restrain them from requiring the plaintiff to bring his goods to the railway station at an earlier hour than they received goods at their own receiving offices.

It was held in a Scottish case that refusal by a railway company to deliver goods arriving at their stations to a particular carrier instead of to the persons to whom the goods were addressed was not a case of undue prejudice under section 2 of the act of 1854. (*Wannan* v. *The Scottish Central Ry. Co.*, 1 N. & M., 237).

In speaking generally of the statute Lord Justice Clerk said:

The object of the statute, we all know, is to protect the public against arrangements made by railway companies to the prejudice of the public, and not only of the public, but of classes of the public and of individuals who may be sufferers by such arrangements. And a very necessary protection it is, though it is hardly as efficient as could be desired.

The fact is our own second and fourth sections of the act to regulate commerce were added to the third section or undue preference clause, which was copied from the English statute, and these additions were made with a view of giving *increased protection* to the public and to classes of the public and individuals.

In the next case the court was equally divided and the rule dropped. It was a case similar to the Garton and Baxendale cases, where the company admitted their own vans at their station yard at a later time of day than they permitted the

entry of vans of individual carriers. The equal division of the court in this case was upon the question whether the Garton and Baxendale cases, in which injunctions against the companies had been granted, were precedents binding upon the court. Erle, C. J., and Montague Smith, J., held that the exercise of special jurisdiction by the court, being subject to no review and depending in each instance upon the special facts in the case, previous decisions under it are not binding on the court in the same manner that precedents in law are binding, and they held that the injunction prayed for would interfere with the traffic which it was the object of the legislature to facilitate, and that it ought not to be granted. But Willes and Keating, JJ., held that the above cases were precedents binding on the court and also were rightly decided, and that the injunction ought to be granted. (*Palmer* v. *The London and Southwestern Rwy. Co.*, 1 N. & M., 243.)

The case of *Pickford* v. *Caledonian Railway Company* (1 N. & M., 252) was a Scottish case, and the decision followed that of *Wannan* v. *The Scottish Central Railway*, above cited.

The case of *Palmer* v. *The London, Brighton and South Coast Railway* (1 N. & M., 271) presents another instance where the company admitted its own vans to the station yards at a much later hour of the day than they permitted those of the complainants and other individual carriers to enter. In this case it was held that the railway company did this with a view to compete with the complainant and other carriers in the collection and carriage of goods, and this was giving an undue and unreasonable preference to the company's own traffic to the prejudice of the complainant, and the rule was made absolute.

In the case of *Parkinson* v. *The Great Western Railway Company* (1 N. & M., 280), the court held that the refusal of the company to deliver to the plaintiff, an individual carrier, upon the order of consignees, goods which the company had carried to its station at C, the company preferring to deliver the goods to consignees by their own agent, was, under section 2 of the act of 1854, an undue prejudice to the complainant in the conduct of his business as a carrier and an undue preference and advantage to the company themselves. This case appears to

be in conflict with the Scottish case of Wannan above cited, where the decision was in favor of the company.

The case of *Goddard* v. *The London and South Western Railway* (1 N. & M., 308) granted an injunction in favor of the complainant on the ground that the company discriminated against Goddard, an individual carrier, by not allowing him the same amount for cartage as they charged to the public for such service when performed by the company. It was further held that if the charge made by the company be made to all for the purpose of preventing competition, then the company should allow the same amount as the service cost the company.

Here follow two cases relating to sea traffic.

The first one is unimportant, it being held that the failure of the company to maintain one dock in order to divert business to another dock was not the subject of redress under the act of 1854. *Bennett* v. *Manchester, etc., Railway*, 1 N. & M., 288.

Section 2 of the railway and canal traffic act (1854), which prohibits undue and unreasonable preferences and advantages being given by railway and canal companies to particular persons does not apply to the case of arrangement made by a railway company whose line terminates at the sea with a steamboat owner for carrying across the sea goods and passengers brought by the railway. *Napier* v. *Glasgow and South Western Railway*, 1 N. & M., 292.

Napier was the owner of a steam vessel called the *Lancefield*, and in connection with the railway had been engaged in the carriage of goods from Glasgow and other points on the railway to Belfast. The point where the *Lancefield*, Napier's vessel, received the goods was the seaport of Ardrossan. They had together through rates which were lower than the sum of the local rates to Ardrossan and the local rates from Ardrossan to Belfast. Napier had under consideration a project to remove his vessel for the purpose of plying between other ports. The railway thereupon entered into an agreement with the owner of the steamboat *Oscar* and gave it the same terms as it gave Napier's vessel. Napier then changed his days of sailing, and the railway company continued to allow him to take traffic under the old arrangement upon the different days of sailing; but finally the railway company discontinued its arrangement

with Napier altogether and compelled him to carry at local rates. Some of the local rates on the railway were higher than through rates from the point on the railway to Belfast, thus making a lower charge for a longer distance. But the greater charges for shorter distances or lower charges for longer distances were not the subject of the controversy and received no attention in the case. The proceeding simply related to the point whether, under section 2 of the act of 1854, the railway company was obliged to allow Napier the same facilities which it had formerly allowed him as a connecting steamboat owner, and which it was now allowing to the owner of the *Oscar;* and the court held, that section 2 of the act did not apply to the case of arrangements made by a railway company with a steamboat owner for carrying goods and passengers from the railway across the sea.

We now meet with the English regulation of railways act of 1873, which not only contained a clause reenacting the undue-preference clause of the act of 1854, but among other things made additional provision for through routes and through rates and the division thereof between connecting lines.

The case of the *East and West Junction Railway Company* v. *The Great Western Railway Company* (1 N. & M., 331) construes section 11 of the regulation of railways act of 1873, the first portion of which requires connecting railways or railways and canals which form part of a continuous line of railway or canal communication to so arrange that no obstruction may be offered the public desirous of using such railways and canals as a continuous line of communication. Attention is here called to the meaning given to the word "line." It is very evident that the meaning ascribed to the word in the statute is a physical line, and the statute gives the railway commissioners power to establish through routes over such a line and to fix and apportion through rates, in case the companies themselves fail to agree in regard thereto. It is decided in this case that a "route" within the meaning of this section is a route from the station on the sending line, where the traffic arises, to the station on the forwarding line, where such traffic is delivered; and the statute distinctly speaks of the junction of railways or of railways and canals *which form part of a continuous line.*

The case of the *Borough of Dover* v. *The Southeastern Railway et al.* (1 N. & M., 349) was dismissed for nonappearance by either party, but prior to the day set for hearing the commissioners decided, upon a motion to amend the application, that "the railway commissioners have full power of allowing the proceedings before them to be amended, and *will exercise such powers liberally* so as to give effect to the provisions of the regulation of railways act of 1873."

The case of *Lees* v. *The Lancashire and Yorkshire Railway Company* (1 N. & M., 352) relates to a complaint of preference in favor of the corporation of Manchester by carrying coal for the corporation to a point from which the company excluded shipments of coal for the complainants and the public generally. The commission found that it was a matter of public benefit and convenience that the corporation should be supplied with coal at the particular station, and it was therefore held that the preference was neither undue nor unreasonable.

The case cited below follows *The Great Western Railway Company* v. *Sutton*, hereinbefore discussed, in construing what constitutes "same description of goods" and in holding the "circumstances" down to the cost of carriage.

A railway company carried coal to G. for shipment from collieries situated on different branches of their line. On one branch the company charged different rates per ton per mile for the carriage of different descriptions of coal, a gas coal rate and a common coal rate. No such classification was made on the other branch. Cannel coal (the only coal raised by the complainants) was the only coal charged at the gas-coal rate, splint coal being classed as common coal. The gas produced from splint coal is inferior in quality and quantity to that produced from an equal amount of cannel coal, but both are used in different proportions for mixing with common coal in the manufacture of gas, for the purpose of increasing its illuminating power. Found, as a matter of fact, that splint coal and cannel coal had enough in common of gas-producing quality to be competitive, and to make them commercially and substantially of the same description for the purpose for which they were used, and that the cost of conveyance to the railway company of splint and cannel coal was the same; and, therefore,

Held, that the carriage of cannel coal and splint coal by the railway company at unequal rates per ton per mile was an undue prejudice to the complainants. *Held, also*, that if by reason of the gradients or otherwise the cost of conveyance of the coal to the railway company on the one branch was different from the cost on the other a proportionate difference might be made by the railway company in the mileage rate. *The Nitshill and Lesmahagow Coal Company* v. *The Caledonian Railway Company*, 2 N. & M., 39.

A railway company, *with the object of discouraging the construction of a competing line*, carried slate for certain quarry owners who agreed to send all their slate over the railway company's line for a fixed number of years, at a less rate than they charged for the same service to the complainant quarry owners, who were offered but refused to bind themselves by such an agreement. *Held*, that this was an undue preference within the meaning of the railway and canal traffic act, 1854, section 2.

The railway company charged the complainant quarry owners 9*d*. per ton for the use of their wagons off the line, and demurrage if they detained them more than twenty hours, while the quarry owners who had entered into the above-mentioned agreement were charged nothing for the use of wagons off the line, and were not charged for demurrage until after the expiration of thirty hours. *Held*, that this service off the line was incidental to the receiving, forwarding, and delivering of the slate, and that the circumstances of the favor shown being in respect of something done off the line did not take the case out of the railway and canal traffic act, 1854, section 2.

The railway company charged the complainants 1*d*. per ton for shunting goods on to a siding, connecting their quarry with the railway, which was the property of the complainants; while no charge was made to other quarry owners for shunting on sidings (the property of the company) connecting their quarries with the railway. The commissioners found as a fact that the service rendered to the complainants was not more onerous to the railway company than the working of the other sidings, for which no charge was made, and, therefore, *Held*, that the extra charge was an undue preference under the second section of the said act. *Held, also*, that what amounts to

undue preference is in general a question of fact, and not one of law. *The Diphwys Casson Slate Company, Limited*, v. *The Festiniog Railway Company*, 2 N. & M., 73.

Here again it was held that the difference in circumstances must relate to the nature and service of the carriage rendered by the company. Although the competing line had not yet been constructed and the construction of which was sought to be discouraged by the favor shown to certain quarry owners, yet the railway commissioners said generally upon the subject of equal treatment:

> Equal treatment does not consist in all being offered a similar agreement, for if the agreement is not for the public interests, *or goes beyond the fair regard which a company may pay to its own interests*, it leaves untouched the right of all under the traffic act (1854) to be put upon equal terms.
>
> The traffic act would never apply if it were a sufficient answer to a complaint of preference that the favored persons had agreed to aid the company in warding off some threatened or apprehended competition. A railway company can not compel the public to purchase equality of treatment by imposing conditions of that character, or of the character of those contained in the special agreements of the *Festiniog Railway Company. The same offer may be made to all, but circumstances are so unlike that every kind of partiality would ensue if the offer must be accepted or parties submit to higher charges.*

Counsel for the railway company cited *Nicholson's case* and the case of *Strick* v. *Swansea Canal Company;* also the case of *Jones* v. *The Eastern Counties Railway*, and *Hozier* v. *Caledonian Railway Company*, as all being in favor of the defendant's position. He also claimed that Ransome's case (No. 1), *Harris* v. *Cockermouth and Workington Railway*, and *Baxendale* v. *The Great Western Railway* (The Reading and Bristol cases) were distinguishable, but the court seems to have regarded the citations made by counsel for the complainant as controlling authorities: *Baxendale* v. *Great Western Railway Company* (The Reading case); *Ransome's case* (No. 1) *Garton* v. *Bristol and Exeter Railway*, and *Harris* v. *Cockermouth Railway*, and complainant's counsel also contended, and the court evidently took the same view, that Nicholson's case (No. 1) was clearly distinguishable.

By section 8 the railway commissioners are authorized to act as arbitrators between the companies. The Midland and Great Western Railway companies had entered into an agree-

ment to carry passenger traffic between competitive stations at "equal" fares, the amount of such fares to be determined in any case of difference by arbitration. On reference to the railway commissioners to fix the equal first-class rate between the competitive stations it was held that the agreement, so far as it neutralized the benefits of competition, should be construed strictly. *Midland Railway* v. *Great Western Railway*, 2 N. & M., 88.

The commission said:

The object of that agreement was to prevent *undue competition* or underbidding between them for that particular traffic, and there is nothing repugnant to it in a reduction (of local rates on the Midland) which is made without any reference to competitive traffic, and adopted by the Midland upon considerations which extend over the whole of their lines, and this being so, whether they have proved their case or not, they have shown a reasonable ground, in the mode in which they have treated their fares wherever they could act independently and without consulting other companies (that is, making a low scale of charges to noncompetitive stations), for going before arbitrators or before this commission, and asking that they might be allowed to treat their competitive fares on the same principle. They have as much confidence in low fares for these lines as for their others, and having by the agreement power to propose at any time a revision of the equal rates they have also observed the implied conditions by which the exercise of such power should be regulated.

In other words, the Midland Company sought to put their competitive traffic upon the same favorable basis as they had independently put their noncompetitive or local traffic, and the railway commission looked upon this with a commending eye. This was really a case where the Midland rates to noncompetitive stations were lower than rates under the agreement to competitive stations—that is, lower per mile. An instance is given in the opinion. The passenger from London to Birmingham could, by breaking up his journey into two parts, one, London to Saltley, and the other, Saltley to Birmingham, paying the locals on the Midland therefor, travel over the whole distance for 17*s*. 1*d*. as compared with the through competitive rate of 20*s*. It was therefore plain that the old agreement did neutralize the effects of competition at points like Birmingham, and this was brought about by the reduction on the Midland of the mileage rates to local points. It was undue preference in favor of local points over competitive points. It was exactly the opposite of cases

which are brought under our long and short haul rule which prohibits greater charges for shorter distances.

The Great Eastern Railway Company fixed certain package rates for the conveyance of fish from Yarmouth to London, as follows:

	Per package.
Under and not exceeding—	*d.*
18 pounds	3
28 pounds	4
42 pounds	6
56 pounds	8

W, a trader at Yarmouth, sent packages of fish in baskets of 20 pounds weight by the Great Eastern Railway to London, for which he was charged, under the above scale, at the rate of 4*d.* for 28 pounds. It was proved that he could not alter the size of his baskets without injury to his business, and that baskets 21 pounds in weight did not cost the company more expense or labor than baskets of 18 pounds in weight. *Held*, that the rate must be 21 pounds and not 18 pounds for 3*d.*, so as to make it uniform and after the same rate as and in due proportion with the charge for packages of greater weight. *Woodger* v. *The Great Eastern Railway Company*, 2 N. & M., 102.

In this case the commission actually fixed the rate by adjusting the number of pounds to be carried at the third-class rate.

A railway company pays no more than a due regard to its own interest if it charges for its services in proportion to their *necessary cost* and has only such a variation in its rates as there is in the circumstances of its customers *affecting the cost and labor of conveyance*. *Bellsdyke Coal Co.* v. *North British Ry. Co.*, 2 N. & M., 105.

The Northwestern Railway Company carried goods for complainants, who were brewers at Burton, and charged them and the public generally 1*s.* per ton for cartage to and from the station, and 9*d.* per ton for terminal services. Truman & Co. and Cooper & Co. were also brewers at Burton, and had breweries connected with the Midland station at that place by railway communication; the goods which were sent or received by the Midland line were loaded and unloaded on their own premises by their servants, and they were consequently not charged

by the Midland Railway Company any rate for cartage or terminal services. The Northwestern Railway Company, *in order* to compete with the Midland for the carriage of the goods of Truman & Co. and Cooper & Co., exempted these firms from the above mentioned rate of 1*s.* 9*d.*, respectively, carting and loading their goods gratuitously. *Held*, that this was a violation of the act of 1854. In order to justify a difference being made by a railway company in favor of individual members of their general class of customers, there must be an adequate consideration to the railway company *lessening the cost* to them of the services rendered to such individual members of the general class, and it is not sufficient that the railway company merely desired to attract the traffic from another line to themselves, *especially where the favor thus shown to a few is prejudicial to many others in the same trade as the favored persons.* This decision was rendered notwithstanding the railway company acted bona fide in the matter, and with no intention of prejudicing the complainants as rivals in trade with others. *Thompson* v. *The London and Northwestern Railway Company*, 2 N. & M., 115.

Here again is reaffirmation of the principle that the *circumstances* to be considered are solely those which relate to the carriage of the goods. (*See* Eversheds case, in the Queen's Bench division, Court of Appeal and House of Lords, hereinafter discussed.)

The Great Western was the delivering road in two alternative routes from B. One route was 20 miles shorter than the other. The initial road in the shorter route applied for permission to make lower through rates than was charged over the longer route. *Held*, that the apprehension of the Great Western Company (the delivering road for either route) that a reduction of rates by the shorter route would entail a similar reduction of the rates by the longer route, and so render the traffic carried by the latter unprofitable, did not justify them in raising the rates by the shorter route above their natural and proper level. *The East and West Junction Railway Company* v. *The Great Western Railway Company*, 2 N. & M., 147.

It was held where a section of a joint line was part of a main line of the Southwestern Railway that the mileage rate for the portion of the through rate should not be higher than that on

the main line, and that a local or short-distance charge made on the joint line by the Southwestern Railway was improper. *Innes and Others* v. *The London, Brighton and South Coast Railway, etc.*, 2 N. & M., 155.

Note that in this case the word "line" refers to the physical structure, and that one section of a line was deemed part of a main line; also that a local charge as part of a through charge on through traffic was improper.

The case of *Foreman* v. *The Great Eastern Railway Company* (2 N. & M., 202) related to mileage rates on coal carried by the defendant railway company in different directions. The complainant brought his coal to Great Yarmouth by sea. At Norwich and other places on the Great Eastern line he encountered the competition of land-borne coals from Peterborough. It appeared that the charges from the two places to Norwich were the same mileage rates, and that as the coal merchants from these opposite directions were treated alike and according to one and the same scale of charges the company committed no infringement of the act in that respect. It did appear in evidence, however, that in some cases coal from Yarmouth to various points on the line was charged rather more and coal from Peterborough rather less than the scale directs, and the company was enjoined against allowing these and all similar discrepancies to the disadvantage of the applicant.

It also appeared that the scale of charges from Peterborough was, in some instances, lower for longer distances, and was made to meet the competition of sea-borne coals through various ports. For instance, the rate to Yarmouth, a distance of 100 miles from Peterborough, was lower than to intermediate points. But Yarmouth was a seaport, and the complainants did not, so far as their trade in Yarmouth itself was concerned, use the Great Eastern Railway at all. So it was held that the applicants had no title to complain. The court said: The traffic act does not "prevent a railway company from having special rates of charge to a termini to which traffic can be carried to other routes, or other modes of carriage with which there is any competition." But it was intimated, as is shown by the case of a difference in the scale from Yarmouth and Peterborough, that where the complainant is shown to suffer undue disadvantage the right of the company to regard competition will be subordinated to the rights

of the public, or, rather, of the complainant. This is further illustrated by showing that the rate was lower from Peterborough to Norwich than to an intermediate point called Thetford. But no one was complaining on the part of Thetford, the intermediate station. It was an incident of the case, and the court held that the complainant must show its grievance on a comparison of the rate from Yarmouth to Norwich, instead of basing it on the higher Thetford rate from Peterborough.

The sending company must allow through booking from their stations to stations on the forwarding company's line. Through booking is a facility which railway companies may reasonably be required to afford, and as exhibiting the total charge for conveyance from end to end is especially of use where doubts exist whether companies are making unequal or excessive charges. *District of Uckfield* v. *The London, Brighton and South Coast Ry.*, 2 N. & M., 214.

Where a railway company had agreed with certain quarry owners for a term of 14 years to carry slates at rates varying from 3*s.* 3*d.* to 2*s.* 6*d.* per ton, according to the total quantity of slates carried in each year, and subsequently a fresh agreement was entered into with one of the quarry owners for a term of thirty years, reducing the rate to 2*s.* 1½*d.*; the court held that the difference between 2*s.* 6*d.* and 2*s.* 1½*d.*, as charges for railway transit, was an undue preference and prejudice. There was also a showing by the railway company that the applicants, being obliged to use smaller wagons for their slates than those used by the favored quarry owners, and also sending slates of a lighter description, occasioned the railway company greater cost of carriage. It was held that 1*d.* per ton would be a reasonable allowance for such increased cost. *Holland* v. *The Festiniog Railway Company*, 2 N. & M., 278.

The case of *Greenop* v. *The Southeastern Railway Company* (2 N. & M., 319) relates to special agreements for a rebate from the tariff rate in consideration of the shipment of a guaranteed quantity per month between London and Paris. It seems that in this case the public convenience was subserved, it being held that the plan of delivering goods between London and Paris at one fixed sum for the entire service, and free of any intermediate charges, was a great convenience to the public, and did not involve any infringement of the railway and canal traffic act, 1854.

The case of *South Sea and Isle of Wight Steam Ferry Company* v. *The London and Southwestern Railway, etc.* (2 N. & M., 341), was a question of discrimination between connecting steamboat lines, and was very similar to the case of *Napier* v. *Glasgow and Southwestern Railway*, hereinbefore cited.

For application of the word "line" to the physical structure of the railways, see *Victoria Coal and Iron Company* v. *The Neath and Brecon and Midland Railway Companies* (3 N. & M. 37). It was proved that the two railways formed a continuous line of communication and that *physically* there was no difficulty in the traffic of the colliery being carried to S by the direct route.

The case of *Lock* v. *Northeastern Railway Company* (3 N. & M. 44) decides that it is undue preference to charge colliery owners who do not rent coal cells of the company a higher rate of carriage than the colliery owners who do rent coal cells.

In the case of *W. & B. Canal Co.* v. *B. Canal Co.* 3 N. & M., 113, the commission in stating a case for the court said:

"The portions allotted by us to the Birmingham Canal Co. out of the said through rates or tolls, allowed by our judgment, are in some cases lower than the rates or tolls which the Birmingham Canal Co. are entitled to charge, and are now charging, for local traffic carried on the same parts of their canals and navigations."

This case has been cited in this country as proving that competition justifies lower long haul rates. The long distance rates which the canal companies together made in order to compete with the railroads *were not less as a whole* than the local rates charged by the canal companies, but they were proportionately less. And the commissioners said that they could be so—that is, the local rates need not correspond to *proportions* of through rates. This is common in this country and not prohibited by our fourth section.

The commissioners held that a railway company, if it makes illegal or excessive charges for the conveyance of traffic, does not afford all reasonable facilities within the meaning of section 2 of the act of 1854. *Held*, by the court of session that a railway company, if it makes illegal or excessive charges for the conveyance of traffic, subjects such traffic to undue preju

dice within the meaning of section 2 of the act of 1854. *The Aberdeen Commercial Co. and the Aberdeen Lime Co.* v. *the Great North of Scotland Ry. Co.*, 3 N. & M., 205; see also *The Chatterley Iron Co.* v. *The North Staffordshire Ry. Co.*, 3 N. & M., 238.

Upon complaint by a trader that he was subjected to an undue prejudice, because he was charged the same through rates to certain places, for traffic from his siding as was charged for traffic from a siding situated 2 or 3 miles further from them, both sidings being in the same district and grouped together by the railway company for through rate purposes.

Held, That as the through rate was a gross sum of a small amount for conveyance over a long route, it was enough, if places that were practically in the same district had the same rate, and that no undue prejudice was caused to the applicant by the same rate being applicable to both the shorter and longer distance sidings. *Lloyd* v. *Northampton and Banbury Junction Rwy.*, 3 N. & M., 259.

In a proceeding to fix through rates on coal over the railways of complaining and defending companies the commissioners held:

Lurgan is 5½ miles nearer to Belfast than Portadown, but the rates at present are the same to Lurgan as to Portadown. *It seems to us that the local rate regarded as ruling the through rate* is too high in comparison with the rate to Portadown, and that there ought to be a difference in the rates to the two places somewhat in proportion to the difference in their distances. *The Belfast Central Ry.* v. *The Great Northern Ry.*, 3 N. & M., 424.

If a railway company charge the same rates for the same traffic going to the same destination from places differing considerably in distance from that destination, this is *prima facie* evidence of an undue preference. Where there is evidence of a preference, whether or not it is an unreasonable or undue preference within the meaning of section 2 is a question of fact.

Upon an application to the railway commissioners for an order restraining an infringement of the provisions of section 2 of the railway and canal traffic act, 1854, it is not necessary to prove actual damage, if damage can be inferred from the circumstances. As a general rule charges on traffic using the same railway under the same circumstances ought to be after the same rate per ton per mile, but the rule is not so

rigid that any scale that is not in conformity with it is illegal, nor are charges that are unequal, or that cause prejudice and disadvantage, prohibited by section 2 of the railway and canal traffic act, unless they act in that way unduly and unreasonably. A railway company charged an uniform rate for traffic from an entire district or coal field; the collieries were grouped because they all worked the same bed of coal, and the grouping applied compulsorily to a coal field extending 20 miles, and covering an area in which some of the collieries were that distance apart. Collieries in one part of such district paid no higher rate than collieries in another for their coal traffic to any particular station, all alike paying one uniform rate irrespective of any difference in their actual distances from such station. Upon complaint by a colliery company in the district that the effect of the uniform rate was to subject their coal to a higher charge per ton per mile than coal from other collieries, and to deprive them of the advantage of their greater proximity to places to which the coal was sent, it was proved that the applicants were charged the same rate for conveyance of their coal to a particular station as was charged for coal sent from other collieries in the same district, although the additional distance to be run was 10 or 15 miles: *Held*, that the grouping system, as it affected the applicants, subjected them to an undue and unreasonable prejudice and disadvantage, and that the railway company ought to carry the applicants' coal at a rate per ton per mile not exceeding that charged to other coal owners of the district, in ascertaining the mileage rate an allowance of 1*s.* per ton in all cases being first made for fixed expenses. *The Denaby Main Colliery Company* v. *The Manchester, Sheffield and Lincolnshire Railway Company*, 3 N. & M., 426.

I think that where you find two collieries are so placed that one is at a much larger distance than the other, and where the question is what is to be the rate of payment from each of them to the same point, the mere fact of the same charge being made to both to the same point, one being from a larger distance than the other, is *prima facie* evidence of an undue preference. It is bringing the colliery, which is naturally at a greater distance, practically as a money matter at the same distance as the other, whereas under ordinary circumstances the one which is nearer to the given point, which is the market, would be able to carry its goods to that market at a cheaper rate, and therefore be enabled, according to the ordinary rule of trade, to sell at a lower price, and so get a preference.

By bringing the other, which is naturally at a larger distance in point of money, to the same distance you do give that which is at the larger distance a money preference over the other and a market preference over the other, and you take that natural preference from the one which had a natural preference, and so prejudice it. (Opinion of Lord Chief Justice Brett in the English Court of Appeal in the Denaby case.)

For an exhaustive description of the powers granted to the railway commissioners by the railway and canal traffic act of 1854, both in the court of Queen's Bench and the Court of Appeal, see *Southeastern Railway Company* v. *The Railway Commissioners and the Corporation of Hastings* (3 N. & M., 464).

Where the company charged passenger fares in excess of the sum they were entitled to demand under the maximum clause of their special act, the court of appeal (affirming the judgment of the Queen's Bench division) held that the commissioners had no jurisdiction to entertain the complaint, because the mere fact that a railway company charged beyond the maximum sums contained in their special act did not amount to a refusal to afford "reasonable facilities." The complaint was that the railway company did not afford all "reasonable facilities," within the meaning of section 2 of the act of 1854. It seems there was a failure to allege undue preference or prejudice, as was the case in the *Aberdeen Commercial Company* v. *Great North of Scotland Railway Company* and the *Chatterley Iron Company* v. *North Staffordshire Railway*, hereinbefore stated. *Brown* v. *Great Western Railway Company*, 3 N. & M., 523.

In a case of relative rates as between Burton and Cambridge and other points on the one hand, and Newark and Cambridge and other points on the other, making a carriage over different lines or over different branches of the same system, the commissioners held as to one branch of the case that the railway company must carry malt, hops, and barley to Newark for the brewers there on equal terms with the terms on which similar traffic was carried to Burton for brewers at that place, having due regard to the circumstances, if any, whether consisting in the routes differing or in portions of the line passed over being more costly to work or having been more costly to construct in the one case than in the other, which may render the cost to the railway company for carrying such traffic for the applicants greater than the cost of carrying a similar traffic for

brewers at Burton. There was also in this case some suggestion of competition for the conveyance of particular traffic between the two termini existing as to Burton and not the other; but the commission held the consideration of the circumstances down to what might affect the *cost of carriage to the company*, and after considering the various elements in the case said: "We think that, subject to due allowances for such cause of difference, we ought to require the company to carry the traffic to Newark on equal terms with the like traffic to Burton." The commissioners also held on the question of jurisdiction that the traffic of two localities is as much within the traffic act of 1854 as the traffic of two or more individuals in the same locality is. *Richardson* v. *Midland Railway*, 4 B. & M., 1.

On complaint of the Denaby Main Colliery Company that the toll charged for coals sent from their colliery by canal to Keadby was greater in proportion to the distance than the toll charged upon coal similarly sent by other colliery proprietors whose collieries were also situated in or near the same canal, but at a distance from Keadby exceeding by several miles the distance therefrom of the Denaby colliery, it appeared that the toll charged on coal to Keadby from the Denaby colliery was 13*d.* and from the other collieries 13½*d.*, and that the coal traffic on the canal between the Denaby colliery and Keadby was worked with less expense and trouble to the canal owners than the traffic between the other collieries and Keadby. *Held*, That the Denaby Colliery Company were subjected to an undue and unreasonable prejudice and disadvantage by being charged a toll only one-half penny less in amount than the toll charged to the other colliery proprietors. *The Denaby Main Colliery Company* v. *The Manchester, etc., Railway Company*, 4 B. & M., 28.

Here was a case of longer and shorter hauls where the shorter distance was charged a *less* rate than the longer distance, but the commissioners found that the difference in the cost of carriage was greater than the difference in existing rates, and therefore ordered a reduction from the Denaby colliery.

Railway companies gave more favorable rates on traffic to Belfast through the ports of Ardrossan and Greenock than

they did through the port of Ayr. On complaint of the Ayr Harbor trustees the commissioners found that the railway companies did charge for the carriage by railway for Belfast traffic destined through the port of Ayr rates higher in proportion to distance than they charged for the carriage by railway of like traffic between the ports of Ardrossan or Greenock and the same stations or places on its railway, and that no circumstances were alleged or proved by the defendant companies sufficient to justify any inequality in proportion to distance on traffic going through the respective ports. *The Ayr Harbor Trustees, etc.*, v. *Glasgow and Southwestern Ry., etc.*, 4 B. & M., 90.

In further illustration of how strictly against the carriers the English authorities construe the regulating statutes the case of *Colman* v. *The Great Eastern Railway* (4 B. & M., 108) is cited. Under section 14 of the act of 1873 the commissioners have power to order a railway or canal company to distinguish in its rate books how much of each rate is for conveyance of traffic and how much is for other expenses, specifying the nature and detail of such other expenses. It was held that the words "specifying the nature and detail of such other expenses" require a railway company to state what terminal services they undertake to perform with regard to the particular traffic and how much they charge for each of such terminal services, and that a railway company does not sufficiently comply with the section by giving a list of the various terminal services which they perform and stating what their total charge is for the whole of these services.

This is in accordance with *Barrett* v. *S. & D. Ry.* (1 Ry. Cas., 443), hereinbefore cited, which holds that where there is an ambiguity in a clause imposing rates, tolls or duties, that construction is to be adopted which is more favorable to the interests of the public and against that of the company.

A coal rate will be a sufficiently paying rate to be allowed (on an application for through rate) if the earnings per truck are not less than the earnings in other trucks of a goods train, and if the company's profit on coal is not less than their profit on their goods traffic generally. *Belfast Central Railway* v. *Great Northern Railway*, 4 B. & M., 159.

It is no answer to the public desirous of using railways as a

continuous line, that there are disputes as to the rights of the companies *inter se*. *Hammans* v. *Great Western Railway, etc.*, 4 B. & M., 181.

A difference in the distance the traffic is carried is not of itself a valid answer to a complaint of undue preference under section 2 of the railway and canal traffic act, 1854, and no conclusive inference is to be drawn either, on the one hand, from a railway company not carrying at an equal mileage rate or not making an equal profit per mile, nor, on the other hand, from the rate for the longer distance, though less per mile, amounting to more for the whole distance, or leaving a larger sum as profit after payment of expenses; and in determining the question whether the lower mileage rate is or is not an undue advantage it is necessary to consider whether either traffic is able to be carried at a less cost to the railway company than the other, or whether either traffic is under different conditions as regards competition of routes or other special circumstances.

A railway company carried coal to B. from the northwestern collieries, an average distance of 30 miles, at an average rate of 2*s*. 2*d*. per ton, and from the southwestern collieries, an average distance of 156 miles, at a uniform rate of 6*s*. per ton. Upon complaint by the northwestern colliery owners that the rates charged for their coal to B. were an undue prejudice to that traffic by reason of the lower rate at which southwestern coal was carried: *Found*, as a matter of fact, that the cost of conveyance to the railway company of coal from southwest was not proportionately less than from northwest, and that a competition existed between such coal at B. sufficient to lay the foundation for a charge of undue prejudice, provided damage had accrued to the complainants as a consequence of the relative rates complained of; but that there was no evidence of such damage, the complainants not having shown that their output of coal was in excess of the demand, nor that they could not find a market for all their coal at existing rates: *Held*, that the carriage of such northwestern and southwestern coal to B. by the railway company *at unequal rates per ton per mile* was not an undue prejudice to the complainants. *The Broughton and Plas Power Coal Company, Limited, and Others* v. *The Great Western Railway Company*, 4 B. & M., 191.

It is to be noted that in the first headnote the statement is made "whether either traffic is under different conditions as regards competition of routes or other special circumstances." But in this case of Broughton (which by the way was a case of relative rates over different lines) the court quotes from the decision of the Court of Appeals in the *Denaby Case* (3 N. & M., 426), and adopts the view of limitation upon consideration of competition therein expressed:

Now, the decision of the court of appeal in the Denaby case establishes beyond doubt that if goods of the same kind are carried to the same destination over the same railway *for distances that are not the same, and the gross charge from the intermediate point is as great as from the more distant one*, there is a preference of one traffic over the other which is *prima facie* an *undue preference* within the meaning of the act of 1854, *and that it is not sufficient to rebut this presumption to show that the charge for the longer distance has been reduced to meet the competition from another route.* The fact that the company was acting in its own interests in reducing its rate over a certain portion of line would not be regarded as a justification if those for whom it carried had competing interests among themselves, and the lower rate operated to the prejudice of one as against another. And the same presumption would obviously arise if the charge for the longer distance, though actually more, was not so to an amount sufficient to cover the cost of the extra services, because there would in that case as in the other, remain a portion of the service rendered to the long distance traffic which was altogether unpaid for, *the amount, namely, by which the cost of the extra service exceed the extra charge;* neither would it be sufficient, in our opinion, that these two items should exactly balance each other, for it would be as improper for the company to work without profit for one customer while refusing to do so for another, as it would be unreasonable to expect them to do so at all. *The Broughton Co.'s case*, 4 B. & M., 191.

That the distance between the points of arrival and departure of two through routes is the same, is too vague a ground for deciding that the rates charged in respect of these routes should be the same. *The Central Wales, etc.*, v. *London and Northwestern Railway, etc.*, 4 B. & M., 211.

See notes at the foot of this case with reference to the propriety of citing debates on the passage of the bill with reference to the construction of a statute.

For a definition of what services are incidental to conveyance and covered by the rate chargeable for conveyance see

Neston Colliery Company v. *London and Northwestern Railway* (4 B. & M., 257).

A railway company had at different times reduced particular rates for traffic from Glasgow to London, but had not given the applicant's traffic the benefit of such reductions till long after the authorized dates for their coming into operation, and after the dates when they took effect for similar traffic from other traders in Glasgow carrying on the same business as the applicant; *Held*, that the applicant had been subjected to an undue prejudice and disadvantage in and about the sale and disposal of his goods in competition with the said other traders in Glasgow carrying on a similar business with himself. *Macfarlane & Co.* v. *The North British Railway Co.*, 4 B. & M., 269.

The next case to be cited is one which has in it the long and short haul feature, traffic being consigned over the same line in the same direction, the shorter distance being to a small town and the longer distance to a large brewing center. There were two branches of the complaint, one being rates on barley *in* to Derby and Burton, and the other rates on malt *from* Derby from Burton. As to rates on barley, the small town (Derby) was the shorter distance point. As to the rates on malt, Derby was the longer distance point. The principles laid down in this case are particularly important. They are succinctly stated in the headnotes which are as follows:

A railway company carried to B from various places on their lines of railway for brewers and maltsters at B, barley and malt at lower rates and on more favorable terms than they carried similar traffic to D for maltsters there. Upon complaint by maltsters at D that their traffic was unduly prejudiced by not being carried on as favorable terms as the traffic of brewers and maltsters at B, competitors in trade with complainants, it appeared that the charge for barley from stations from which barley was sent to both places averaged, to D, 6*s.* 11*d.* per ton and to B 5*s.*, or 1*s.* 11*d.* per ton less. The railway company sought to justify this inequality in the rates for the inwards grain traffic of the two places on the following grounds, viz:

(1) That the traffic of the two places differed greatly in amount, the total traffic of B being 600,000 tons per annum, of which 55,000 tons were barley, and that of D 220,000 tons, of which 6,900 tons were barley.

(2) That the truck loads conveyed to D did not weigh as much per truck as to B. The average extra weight of the truck load to B was from 8 to 10 cwt., and the earnings on the

extra weight were claimed to be all clear profit, on the ground that half a ton more of paying load did not increase the cost of hauling the truck.

(3) That about 17 per cent of the trucks received loaded with barley at D, could not be reloaded there with any other traffic, and came away empty on the outward journey, whereas loaded wagons into B were practically certain of a back load, the hauling of each empty from D costing 1*s.* 6*d.* and adding 4*d.* a ton to the expense at which its inward load was carried.

(4) That the cost of the goods station staff was 5*d.* more per ton at D than at B.

Held, (1) That a difference of charge could not be sustained on the general ground that the aggregate traffic of the one town exceeded that of the other, it having been proved that the B rates were charged, not only to the large brewers and maltsters, but to all the inhabitants of the place, however small might be the quantity of their traffic, and that there was nothing exceptional in the natural position of B to affect the rate at which goods could be carried.

(2) That some difference in the rates for competitive traffic to B and D might be allowed in respect of the average weight of truck loads, and that assuming traffic to D to pay the same rate per mile as traffic to B, there ought to be an addition made to the D rate as for 8 cwt. or 10 cwt. more per truck to equalize matters with B, as regards mileage receipts per truck.

(3) That some difference in such rates might be allowed in respect of the certainty of back loads from B, and that, as it was proved that one fifth part of the loaded wagons to D were in excess of its requirements for outward journeys, a fourth or fifth part of 4*d.* a ton should be added to the D rate, assuming traffic to D to pay the same rate per mile as traffic to B.

(4) That as barley was not a part of the merchandise handled in the goods station either at B or at D, the cost of the goods staff was no part of the working charges in carrying it; and that the alleged greater amount of such cost in proportion at D did not furnish a ground for a higher rate on barley carried to that place, and only using a siding in the goods yard for the same purposes and to the like extent as the like traffic at B used the deposit sidings there.

Held, therefore, that the railway company must carry barley and malt to D for maltsters there on terms equally favorable to such maltsters with those on which similar traffic was carried to B for maltsters at that place, having due regard to the differences which had been proved to exist in the traffic to the two places, respectively, in respect of the average weight of truck loads, and of certainty of back loads, and to such other circumstances (if any) as might render the cost to the railway company of carrying such traffic to maltsters at D greater than the cost of carrying similar traffic for maltsters at B. *Girardot, Flinn & Co.* v. *The Midland Railway Company*, 4 B. & M., 291.

It was especially stated by the commissioners that they were dealing only with the local rates of the company, no other company having been joined with it, and "we do not therefore deal with through rates for traffic carried part of the way by other railway companies."

Upon the question of a proper construction of the meaning of the word "line" the following would seem to be authority:

A route, for which through rates are proposed, that would be a reasonable and serviceable route if worked throughout by one railway company, does not lose its serviceableness because two or more companies are concerned in working it; for the railway and canal traffic act, 1854, section 2, is intended to secure that, in the case of a *continuous line* formed out of the railways of different companies (this clearly refers to the physical structure of the railway), the companies should coöperate for the transit of through traffic, and send it forward to its destination as though it were their own proper traffic. *Swindon, etc., Railway* v. *Great Western Railway*, 4 B. & M., 349.

There is also a ruling in this case in regard to the responsibility of a carrier which refuses to enter into a through rate over a direct route to a point, and gives the preference to a local route in the making of their rates. The commissioners say on this head: "We think it a principle of importance to the public that a route between places offering the best opportunities for railway carriage, *as far as distance is concerned*, should not be placed at a disadvantage merely because portions of the route belong to railway companies which had an alternative route and made lower charges in favor of the latter." This is another illustration of the principle followed by the English courts and commission that the "fair interests of the company" must give way whenever they come in conflict with the public interests.

The case of *Merry and Cunninghame* v. *The Glasgow and Southwestern Railway* (4 B. & M., 383) involved questions of undue preference between competing ironmasters and arose under a short-distance clause in a railway act giving the company the right to charge for 6 miles where the traffic was carried for less than 6 miles. The company gave a slight preference to one of the competing ironmasters as against another, the complainant. The commissioners were divided upon different branches of the case.

Evershed v. *London and Northwestern Railway*, 2 Q. B. D., 254; 8 Q. B. D., 135 (court of appeal); 3 App. Cases, 1029 (House of Lords), lays down the principle that the competition of another railway will not justify lower rates, or greater service for the same rate, where the discrimination constitutes an undue preference, and also that competition does not make a difference in the "circumstances" under section 90 of the act of 1845, the equality clause. This case affirmed the judgment of the railway commissioners in *Thompson* v. *London and Northwestern Railway* (2 N. & M., 115). See also *Harris* v. *Cockermouth* (1 N. & M., 97), cited approvingly by the court of the Queen's bench. Comparing this case with that of Harris the court says, "The only difference being that in the present case the competition actually exists which was there threatened."

In deciding the case of Evershed in the court of appeal Bramwell, L. J., said:

Undoubtedly it seems a little hard at first sight that by deciding in favor of the plaintiff the defendants will probably lose the whole traffic of the three firms; but after further consideration *it will be found that the hardship is scarcely real*, for the defendants can keep a share in the traffic of the three firms, *provided they carry the plaintiff's goods at the same rate as those of the three firms.*

Again the learned judge said on the item of distance:

If the three firms *were a mile nearer* than the plaintiff to the defendants' station doubtless the defendants might charge the plaintiff a larger sum for carriage. But the only advantage here that the three firms have is that they have easy access to another railway. So they might have to a canal or ordinary highway. *But these considerations, though a reason for the diminished charge, do not justify the extra charge to the plaintiff.*

Lord Justice Cotton, in the same court (the court of appeal), held the natural advantages of one customer over another to refer to the advantage he may have for using the particular railway.

The headnotes to the decisions rendered in the House of Lords are as follows:

The 90th section of the 8 and 9 Vict., c. 20 (railways clauses consolidation act, 1845), requires equality of tolls for similar services rendered by railway companies to all persons; and s. 2 of the 17 and 18 Vict., c. 31 (railway and canal traffic act,

1854), forbids the giving of any undue or unreasonable preference or a dvantage to any particular person or company. A charge made by a railway against A for services rendered by that company to him must not, therefore, be greater than the charge made by the same company against B for rendering him services of the like nature.

E. was a brewer at the town of B., where three railways had their stations. With one of these railways, M., certain brewers in the town had direct communication by sidings, which enabled goods to be sent to the trains and taken from the trains of Railway M. with greater ease and less loss of time than by the way of ordinary cartage. M. charged them nothing for cartage, and made a rebate in the charge for station to-station conveyance. These brewers had no such communications with Railway N W, but it was often convenient for them to send by that railway; and the directors of that railway, in order to compete with Railway M., allowed these particular brewers the same advantage as to cartage and rebate as Railway M. did. As to all others in the same trade (E. among the rest) the directors of Railway N W made the ordinary charge for cartage and allowed no rebate on the charge for conveyance on the line.

Held, that this was an inequality and an undue preference within the meaning of the statutes.

Where E., one of the persons thus paying the higher rate, had for some time paid it in ignorance of the facts, but afterwards, on finding that he was subjected to this higher charge, paid it under protest:

Held, that he was entitled to recover back, in an action for money had and received, the difference he had so paid under protest.

London and Northwestern Railway Company v. *Evershed* (3 App. Cas., 1029).

The Lord Chancellor held that the plaintiff, Evershed, had nothing to do with what might be policy and expediency for the company. "That is exactly one of those things which *Parliament has not left open to railway companies to judge of—whether in that way they will equalize their capacity for competing with other lines or not.*" In what way? By charging higher rates on noncompetitive or shorter distance traffic.

Lord Blackburn said:

It may be (but I do not give any opinion as to that) that it would have been provident and proper on the part of the legislature, in making the enactment (sec. 90 of act of 1845, the equality clause) to say that there should be an exception in such cases (when the railway encounters competition), and that there might be a different rate given in order to coax and induce traffic to go by a different route from that by which it

would otherwise have gone. However, whether that would have been a prudent and proper thing for the legislature to say or not, it is not what the legislature *has* said, and it is very likely that it was the intention of the legislature not to say it, because it was thought that if equality of charge is to be disregarded under *any* circumstances, *that might be made a cloak for making inequalities of charge under unjustifiable circumstances*. I do not know whether that was the motive and intention of the legislature or not, *and I do not inquire*. What the legislature has clearly said is that the tolls must be charged equally to all persons *under the same circumstances*. I think that means *under similar circumstances as to the goods, and not as to the person*. (*Evershed's Case* in the House of Lords, 3 App. Cas., 1029.)

The next case is that of *Budd* v. *The London and North Western Railway Company*. The plaintiff's iron and tin-plate works were situate near the defendant's railway and 12 miles distant from the seaport of Swansea. There were other manufacturers of iron and tin plate at works situate within a radius of 6 miles of the seaport of Swansea and farther, therefore, from Liverpool than the plaintiff's works. There was communication by sea between Swansea and Liverpool. The defendant's railway also connected Swansea and Liverpool. The railway charged the plaintiff 12*s*. 6*d*. per ton for the carriage of iron and tin plates to Liverpool while it charged the competing manufacturers nearer to Swansea and farther from Liverpool only 11*s*. 4*d*. per ton. This lower rate was fixed by the defendant in order to compete with the sea carriage, and by reason of the lesser charge plaintiff's competitors who were thus favored were enabled to sell their plate at a lower price per ton, proportionate to the difference in the tonnage delivered at Liverpool, than the plaintiff's company. *Held*, that the charging of a lower rate to the manufacturers within the 6-mile radius for the carriage of their goods a longer distance than the plaintiff's company was an undue and unreasonable preference and advantage granted to them by the defendant, and that the plaintiff was entitled to maintain an action to recover the amounts paid by his company to the defendant company in excess of the 11*s*. 4*d*. rate. *Budd* v. *L. & N. W. Ry.*, 4 B. & M., 393.

Counsel for Budd cited *Evershed* v. *London and North Westtern Railway* (2 Q. B., 254) and *Harris* v. *Cockermouth and Workington Railway* (1 N. & M., 97); while defendant's counsel relied upon the *cases of Ransome* (1 N. & M., 63) and *Jones* v. *E. C. Railway* (1 N. & M., 145).

The opinion in this case is very short. Kelly, C. B., said:

I am of opinion that the plaintiff is entitled to our judgment. The question is, whether what the plaintiff complains of, as stated in the special case, amounts to an undue preference and advantage to the manufacturers within the 6-mile radius within the meaning of section 2 of the railway and canal act 1854. That there is a preference, and of the most mischievous description, no one can doubt, because it enables these manufacturers to sell these goods at a cheaper rate than the plaintiff—in fact, at a rate of 10 and 12 per cent cheaper. This is highly mischievous, and the denial of those facilities of traffic which the company is bound by the act to supply to all equally. This being, then, a preference, can we say it is an undue preference? First, apart from authority, I think we need only look at the facts of this case to say that it is a direct violation and abuse of the words of the act. The only excuse given is, that the company may compete with the sea traffic; but the question still would remain, supposing they are entitled to charge a lower rate for some and not for others, where are they to stop? According to their present contention, the manufacturer who happens to be half a mile within the radius would be preferred to one immediately without it, and I can come to no other conclusion on the facts than that this is within the michief of the act.

Now with regard to authority. I think that this case is really identical in principle with *Evershed* v. *London and Northwestern Railway Company*. I think there is no difference in substance between the endeavor to succeed in competition which the defendants have made in this case and in that case, and we could not decide this case otherwise than in favor of the plaintiff without overruling that case. The case of *Jones* v. *Eastern Counties Railway Company* does not apply. It was not a case of competition at all. The chief case relied on by the defendants in the argument was *Ransome's* case; but this does not, I think, operate in any way in their favor, for there the decision was in favor of the plaintiff, and any expressions in the headnotes which appear to be in favor of the defendants *are really obiter dicta*. I am, therefore, of opinion, both on the facts and on authority, that the plaintiff is entitled to our judgment.

The case of *The Manchester, Sheffield and Lincolnshire Railway* v. *The Denaby Main Colliery Company* was an action for a balance of carriage account, with a counterclaim by the colliery company for overcharges during a period of six years before the commencement of the action. (See 4 B. & M., 437.) This case should not be confused with the case of the *Denaby Main Colliery Company* v. *The Manchester, Sheffield and Lincolnshire Railway Company* (3 N. & M., 426).

This case (in 4 B. & M., 437) was tried in the Queen's Bench division and also in the Court of Appeal. The important part of this decision to a case under the American law is the construction given by the Court of Appeal to the meaning of three expressions in section 90, the equality clause, of the act of 1845: First, "passing only over the same portion of the line;" second, "under the like (or same) circumstances;" and third, "in favor of or against any particular person." The court said: "The expression 'passing only over the same portion of a line' appears to us to mean business between the same points of departure and arrival, and passing over no other part of the line. This interpretation is the natural interpretation of the words." It was adopted by the Lord Chancellor in *Finney* v. *Glasgow Railway*, in Queen's H. L. cases, vol. 2, p. 183, and in *Murray* v. *Glasgow and Southwestern Railway* (4 B. & M., 456).

The court held that section 90, the equality clause, has no application to grouped lines. "The goods carried over them are not carried only over the same part of the line. They are carried over the same part, but also over other parts, and are not, therefore, within that proviso."

It should be noted that the word "line" is here used in the equality clause, and the construction put upon it by the court, not only in this case but in every other case in the English reports, refers solely to a physical line and not to a conventional line formed by contract between connecting roads. Here was a case of several short lines to colliery stations running to a seaport town. It is probable that what the court of appeal described as "grouped lines" was nothing more than siding branches of a single line or of a forked line. With reference to the carriage of goods from these stations he said: "They are carried over the same part, but also over other parts (of the line), and are not therefore within that proviso."

As to the second expression in the equality clause, the phrase "under the like circumstances," the Court of Appeal said, this "has been the subject of decision, *and must now be taken to mean under like circumstances as regards the services performed by the railway company in receiving, carrying, and delivering the goods.* This was decided in *Great Western Railway Company* v. *Sutton* (4 H. L., 226) and *London and Northwestern Railway Company* v. *Evershed* (3 App. Cas., 1029). In the present case the railway company have infringed this

provision of section 90 as regards the coal carried to Grimsby and shipped on the American steamers, and also as regards the coal carried to Grimsby and shipped to ports south of Harwich." As to the expression "in favor of or against any particular person" at the end of section 90, the equality clause, the court said:

These words occur in a sentence which follows the early part of the proviso and which is part of the proviso. The prohibition at the end of section 90 appears to us to do little more than throw light on what is meant by "same circumstances," and emphasizes the early portion of the proviso. Both portions of it are confined to cases under which goods of a similar description are carried only between the same termini and under the same circumstances. We do not think that the prohibition extends to other goods not so carried. The prohibition is not an independent enactment applicable to goods not already provided for. If it were the whole section would prescribe equality of rate of toll in all cases; for tolls which can neither be reduced or advanced in favor of or against any one must be at the same rate to all persons.

The court says, after referring to the view taking of the equality clause by Lord Blackburn in *Sutton's Case* (4 H. L., 238, 243):

This view of section 90 (equality clause) no doubt very seriously limits its operation. But its failure to accomplish its supposed object is notorious, and that very circumstance led to the passing of the much more sweeping enactment contained in the railway and canal traffic act, 1854.

The court further held that an action for overcharge under section 2 of the act of 1854 the undue preference clause could not be maintained and therefore that the defendant's counterclaim can not be based on any such violation.

Manchester, Sheffield and Lincolnshire Railway Company v. *Denaby Main Colliery Company* (4 B. & M., 437).

The Scotch case of *Murray* v. *Glasgow and Southwestern Railway* (4 B. & M., 456) construes section 83 of the act of 1845, which, as applied to Scotland, is in substance the same as section 90, the equality clause, of the act of 1845, in the same manner as that applied by the court of appeal in the case of *Manchester, etc., Railway* v. *Denaby Main Colliery Company*, last above cited. Indeed this Scotch case was to a considerable extent followed in the case of *Railway* v. *Denaby Main Colliery Company* just considered. The burden of the decision in this

case, however, is whether an action for overcharges will lie under section 2 of the act of 1854, that is, the undue preference clause. The Scotch court decided that it would not; this too, notwithstanding the case of Evershed and Budd, which the court in this case endeavors to distinguish.

It is to be observed that the English construction of the word "line" is uniformly that of a physical line, whether operated by one railroad or by connecting railroads. And in that view the mere connection of tracks made the line of one railroad a part of a connecting or continuous line, and a part of as many continuous lines as there might be connections of the tracks of different roads. And further, there is no definition in the English cases of the *legal* meaning of the word "circumstances," as used in any prohibitory section, which extends beyond circumstances applying to the carriage of goods. The word is in such common use and made to stand ordinarily for so many things that it is frequently encountered in English decisions, and for that matter in the decisions of our own courts, as signifying all the facts in the case of whatever nature or consequence. But, in defining the meaning of the word "circumstances," when used as part of a statutory rule prescribing equality of treatment between persons, as in the equality clause of the act of 1845, or equality of treatment as between different localities, as in the long and short haul rule of our statute, the meaning of the words can not be held to be so extensive as to destroy the rule of equality intended to be laid down, if, taking the provisions of the section as a whole, such a reasonable signification can be accorded to the term as will give effect to the operation of the section.

This rule of construction unquestionably obtained in the English courts in considering the meaning of the term "circumstance." It was limited to the relative services accorded by the carrier to the persons served. It must also be taken in this sense and applied to the transportation of property for different distances. It is clear that, even under the equality clause of 1845, such a construction would have been given to that clause as to make it apply to different distances if it had not been for the unfortunate insertion in that clause of the words "*passing only over the same portion of a line.*" The English courts labored earnestly to give such a construction

to this section as would make it apply to railway services rendered over different distances, but the phrase "passing only over the same portion of the line" is not ambiguous, and, with every disposition to give the fullest effect to the remedies intended by the statute, the English courts were obliged to limit the application of the equality clause to services rendered between the same stations. If there had been any ambiguity, it is clear that the English courts would have given that construction to the equality clause which would extend it, in the fullest sense, in the public interest. They did this with the word "circumstances." They did it, whenever possible, under the general phraseology of the undue preference clause in the act of 1854, and they were only estopped from so doing with regard to the equality clause by the apparently plain prohibition contained in the words "*passing only over the same portion of a line.*"

In *Severn and Wye, etc., Railway* v. *The Great Western Railway Company* (5 B. & M., 156) it was said, upon an application for a through route and a through rate—

For the particular facility, therefore, of through rates, an application by railway companies is required, but within that limit the condition is general, and the smallest company stands on a footing of equality with the largest, and, though the power of proposing a route ought not to be used for no better purpose than to take traffic from one company and give it to another, the means by which the act intends that companies, large or small, shall not suffer in that way are to be found in the two other conditions, and ought not to be sought to be obtained by holding that companies have no *locus standi* given them to claim a through route when their interest in the route is relatively inconsiderable.

The two other conditions referred to are, that the granting of what is so asked is in the interest of the public, and that the route is a reasonable one. The "fair interests" of a larger company were not allowed to prejudice those of the smaller company, or of the general public, or outweigh the fact that the route is a reasonable route. So with competition. The "fair interests" of the company have not been allowed by the English courts and commissioners to justify cases of undue preference or prejudice to individuals in the same or different localities.

Prima facie, it is in the interest of the public that there should be at least two railway routes open between any two

given places, provided that those routes are practically independent of one another, fairly alternative. and reasonably calculated to keep one another in check. And a route is a reasonable one which is capable of maintaining a competition with quicker or cheaper routes and efficient enough to be likely to be preferred for some portion of the traffic. *The Great Western Ry. Co.* v. *The Severn and Wye, etc., Ry.*, 5 B. & M., 170.

But the announcement of such doctrine had for its basis the fact that the making of through routes and through rates and protection of the "fair interests" of the railways was within the authority of the railway commissioners, and, further, that at the date of this decision, in January, 1887, and for a long time previous, the great railway systems of England were separated into districts. This had been rendered possible by the progress of amalgamation and consolidation for railway lines. And where two large systems met at a given point the vicinity of that point was held to be common territory of both systems. Moreover, the competition indulged in by railroad companies very largely refers to competition in service—in facilities rendered to the public—because of the many restrictions which the English system of railway regulation places upon arbitrary reduction of so-called competitive rates.

In this case the principle laid down by Mr. Commissioner Miller is pointed enough to quote:

The right of a company is (outside this question of through rates) to collect what traffic it can, to carry it as far as it can, and to hand it over at the end of that transit to any other company which has to carry it on. The right of a customer is to select what company he pleases to deliver his traffic to, to deliver that traffic to that company, and to require, *without any second booking* or any second payment, that the traffic shall be delivered at the station to which he desires it to be sent; provided, always, that he tenders the traffic to the company at a station where there are proper facilities for receiving it, that he names as the delivering station a station where there are proper facilities for delivering it, and that *there is a continuous route* (I do not care through how many companies' hands it goes) connecting the two stations. But in such a case, apart from the particular facility of a through rate, the sum which the customer will have to pay for the transit of his traffic will be ascertained by adding together the local rates of the various companies over whose lines it passes. That facility is one which is absolutely the right of every individual customer, and is given by the second section of the act of 1854, and is entirely

independent of any question as to the reasonableness of the route or the reasonableness of the rate as an accommodation to the public. It is only when the customer *is unwilling to pay so large a sum as the sum of the local rates will amount to* and desires that a different rate, estimated in a different manner, shall be applied to the entire transit, that any question either of the reasonableness of the route or of the public interest intervenes. (*Great Western Railway* v. *The Severn and Wye, etc., Ry.*, 5 B. & M., 188.)

The foregoing brings this review of English cases down to the date of the passage of the act to regulate commerce.

Where the rates to two iron works situate, respectively, 26 and 35 miles from the market to which the traffic of each was sent were, respectively, 2*s.* 8*d.* and 2*s.* 9*d.*, so that the railway company carried the extra distance to the further of these at the rate of one-tenth of a penny per ton per mile, or a sum insufficient to pay the cost of earning the difference in the two rates, and where the only reason given for the smaller charge to the further works was that a low rate was necessary to enable these works to compete with the works nearer to the market: *Held*, by Mr. Commissioner Price and Mr. Commissioner Miller (Sir Frederick Peel dissenting) that that constituted an undue prejudice to the owners of the nearer works, and an undue preference to the owners of the further works. *Held*, by Sir Frederick Peel and Mr. Commissioner Miller (Mr. Commissioner Price dissenting) that applicants, except those coming within section 13 of the regulation of railways act, 1873, must show that they are damaged by the undue preference complained of. *The Skinningrove Iron Company* v. *The North-Eastern Railway Company*, 5 B. & M., 244.

While a majority of the commissioners, Sir Frederick Peel dissenting, held that a case of undue prejudice was made out, a majority of the board, Mr. Commissioner Price dissenting, held that the applicants had failed to show that they were damaged by the undue preference complained of. The important difficulty in this case was that the company had the right to apply certain maximum charges laid down by their special act.

The case of the *Londonderry Port and Harbor Commissioners* v. *The Great Northern Railway and others* (5 C. & M., 282)

presented a variety of questions as to the relation of rates from points in Ireland through two ports, Greenore and Derry, to points in England. The railways preferred the port of Greenore, and in several instances made through rates through that port while charging the sum of the locals through Derry. It was held that a railway company having control of two competing routes ought to afford equal facilities to the public by both routes. And further held that an agreed through rate via route A, where there is no corresponding rate via route B, may be such, relatively to the local rates of a company owning a material link in both routes, that such company, by agreeing to the rate, gives an undue preference to senders of traffic by route A. Here the court distinctly recognized the principle of comparing total through rates with local rates. Upon the point of comparing proportions of through rates with local rates Sir Frederick Peel held (what is settled law in this country) that "an apportioned part of a through rate can hardly be compared with a local rate, as if the two were of a similar kind. Nor does it seem to us to signify how an apportioned part of a through rate by one route compares with a local rate by another route, *unless, indeed, the latter has no other rates at which through traffic can be sent by it.*"

In this Londonderry case the case of Budd is cited by the commissioners, and it was intimated that if the complainant had been a proper party to complain of lower charges made for longer hauls that that case would have been followed. The commissioners say upon this point, that through rates diminish in amount as the distances the traffic is carried increase is an inequality which may be indefensible, but of which a harbor board—through whose port the traffic passes when using one or two alternative routes—are not proper parties to complain if the rates by the route in which they are interested are respectively equal in gross amount to those by the other route—that is, the harbor board might complain of relative rates to the same point in England if the rates were different, but they were not entitled to complain against greater charges for shorter hauls through their own port.

Mr. Commissioner Miller said:

I do not think that the mere fact that it is a through rate, *i. e.*, a rate agreed to in consent with other companies, and not one imposed by the sole authority of the company in question, would be sufficient to protect it from the charge of undue pref-

erence. What the customer has to regard is indeed the through rate as a whole, and not the separate interests of the several companies concerned, but in regarding that whole it is immaterial to him whether the route is the property of a number of companies or of one only.

And Mr. Commissioner Miller here approvingly cites the case of Budd.

The case of *Menzies* v. *The Caledonian Railway Company* (5 B. & M., 306) was another case of discrimination against an individual carrier in favor of the company's agent. The discrimination was corrected by the commissioners, but as to the delivery of certain traffic to the complaining carrier or his agent, the commissioners held that as this was a Scotch case they were bound to follow the two decisions in the Scotch Court of Sessions of Wannan (1 N. & M., 237), and Pickford (1 N. & M., 252).

An agreement between one trader and a railway company, which secures to the trader rates unequal when comparedwith those of another trader having similar traffic which is carried by the railway company to the same place, is *prima facie* an undue preference, and the circumstance that the railway company have offered the same agreement as to rates and rebates to the competing trader will not necessarily justify the inequality. (Harris *v.* Cockermouth Railway Company (ante vol. 1, p. 97), followed. Large and regular traffic not being secured by a railway company under the agreement, the rates and rebates were not justified by the circumstance that a certain percentage of the preferred trader's traffic was agreed to be sent by the railway company's line If A's traffic can be worked more cheaply than B's traffic, rates or rebates in proportion to that difference in cost would be justified. *Held*, in the particular case, that the difference in the rates charged to the two traders for iron ore was justified by those circumstances and that the difference in the rates for coal was not. *The Rhymney Iron Company* v. *The Rhymney Railway Company*, 6 B. & M., 60.

There was in this case the competition of another railway; and an agreement with the defendant railway to send all traffic by its line. The Cardiff traffic of the complaining company and the favored shipper went over the same line of railway.

Upon this question of special agreements the following, quoted from the opinion of Mr. Commissioner Miller, is significant:

But, then, an extremely ingenious and able argument, if I may take the liberty of saying so, has been adduced to us of this nature: "Let it be granted that we can not show any advantage arising from the incidents of this particular traffic itself, as compared with the incidents of any other portion of similar traffic on the line, still we show, coming from one set of customers, an enormous volume of traffic, which secures to us a steady occupation for our engines, carriages, and porters. In fact our line is kept steadily full, and we consider we are entitled to take that great volume of traffic, coming from this one set of customers, into account, and to give them more favorable terms than we give all the other customers which make up the balance of our traffic." It appears to me that that is the very thing which the act of 1854 was intended to forbid. A company would never, I assume, for the credit of English business men, have given a preference to one customer over another merely from caprice, or from any malicious intention toward the other customers. *It was always given because the company thought, rightly or wrongly, they could get some benefit to themselves by doing so.* But the very object of the act of 1854 was to provide that it should not be given under circumstances which, in regard to the particular class of traffic concerned were not in themselves reasonable; that is to say, that the reasonableness of the thing should arise out of the incidents of the particular class of traffic concerned, and that I take to be intended by the very words "any particular class of traffic," used in that second section of that act of 1854. When you come to look at the dicta of the judges in respect of this question you will find that wherever they refer, as they do refer occasionally to large quantities of traffic as against small, they are always speaking of circumstances antecedent to the making of the rate. That it is clearly within the competency of the company, by reason of an antecedent agreement which secures them exceptional advantages, to give to the persons who make that agreement corresponding advantages, must, I think, be admitted, but then those must be advantages which the company can reckon upon, and which, when reckoned upon, will enable them to gain for themselves an advantage in the conduct of the traffic affected by the agreement corresponding to the advantage that they give.

Subsequently counsel for the defendants, the Rhymney Railway applied to the court of the Queen's bench for a mandamus to the commissioners to state a case to raise questions of law for the consideration of the court. Upon argument the court of the Queen's bench refused the mandamus. The company appealed to the court of appeal, from the refusal of the Queen's

bench to grant a mandamus to the commissioners, but the appeal was not sustained.

A railway company insisting upon the prepayment of rates in excess of those authorized by Parliament and threatening to cease carrying the traffic, if they are not prepaid, subject their customer to an undue disadvantage. So held by the railway commissioners.

An overcharge, even where it is not alleged that other traders are unduly preferred, or that the persons overcharged are subjected to any prejudice or disadvantage other than the necessity of paying the legal rate is, if the legal amount has been tendered and refused, or if the railway company has threatened to prevent or obstruct the traffic except upon prepayment, a denial of reasonable facilities and a violation of section 2 of the railway and canal traffic act, 1854. So held by the railway commissioners.

Held, by Huddleston, B., and Manisty, J., that the railway commissioners had no jurisdiction to entertain a complaint of such an overcharge. *The Distington Iron Company* v. *The London and Northwestern Railway Company et al.*, 6 B. & M., 108.

On an appeal to the House of Lords from the decision of the court of appeals in the overcharge case of the *Manchester, Sheffield and Lincolnshire Railway* v. *Denaby Main Colliery Company* (4 B. & M., 437), it was held in the House of Lords (11 App. Cas., 97) with respect to the construction of section 90 of the act of 1845, equality clause, and the application of section 2 of the act of 1854, the undue preference clause, as follows:

The provision in section 90 of the railways clauses consolidation act, 1845 (8 and 9 Vict., c. 20), requiring equality of rates for carriage of goods "passing only over the same portion of the line of railway under the same circumstances," applies only to goods passing between the same points of departure and arrival, and passing over no other part of the line. And mere inequality in the rate of charge when unequal distances are traversed does not constitute a preference inconsistent with the concluding words of that section. Therefore, where a railway company carried coals from a group of collieries situate at different points along their line and charged all the collieries with one uniform set of rates in respect of

such carriage, and the owners of the colliery lying nearest to the point of arrival brought an action for overcharges—

Held, Affirming in this respect the decision of the court of appeal, that the railway company had not infringed the provisions of section 90 of the railways clauses consolidation act, 1845: *Held*, *also*, That *in this case* an action did not lie for breach of section 2 of the railway and canal traffic act (17 and 18 Vict., c. 31), undue or unreasonable preference or prejudice not having been made out.

Where goods are carried for different customers "over the same portion of the line of railway," the fact that the goods carried for one customer are to be shipped to certain ports in order to develop a new trade, or open up new markets, and so to increase the tonnage carried, does not constitute a difference in the "circumstances" so as to justify inequality of rates. Therefore, where a railway company carried coals over the same portion only of the line to G, both for the appellants and also for B, and allowed B 8*d*. per ton in respect of all coal carried to G, and there shipped for the West Indian market; and also allowed B 6*d*. per ton in respect of all coal carried to G, and there shipped by him to certain ports, in consideration of a *bona fide* undertaking by B to develop the trade in those ports, to provide the vessels, and to run the risks incidental to the working of such traffic:

Held, affirming in this respect the decision of the court of appeal, that the coals were carried "under the same circumstances," and that the allowances were breaches of section 90 of the railways clauses consolidation act, 1845:

Held, also, reversing in this respect the decision of the court of appeal, that the appellants were entitled to recover the overcharges by action against the company, the amount to be ascertained by finding what quantity of coal carried under the same circumstances and over the same portion only of the line was charged at the higher rate to the appellant at the time the lower rate was charged to B.

A railway company which carried coals for the appellant and also for B and J "over the same portion of their line of railway," and made allowances and a rebate to B and J proved that they carried for B and J at a less cost to the company, but did not show that the allowances and rebate were adequately represented by the saving to the company.

Held, affirming in this respect the decision of the court of

appeal, that the difference in cost constituted a real difference in the "circumstances;" that there being nothing to show any want of good faith, the company were not bound to prove that the allowance and rebate were adequately represented by the saving; that there was no breach of sec. 90 of the railways clauses consolidation act, 1845; and that the appellant could not therefore maintain an action for overcharge under that section.

The Denaby Main Colliery Company v. *The Manchester, Sheffield and Lincolnshire Railway Company*, 6 B. & M., 133–134.

In this decision the *Cases of Sutton* (4 H. L., 226) and *Evershed's Case* (3 App. Cas., 1029) were distinctly recognized and followed.

Where two railway companies each had a station at A, which stations were connected by a line of railway belonging to one of the companies, upon complaint that no passengers were conveyed on the railway between the two stations, although there was a *continuous line of railway*, the court made an order enjoining both the railway companies to afford all due and reasonable facilities, so that no obstruction might be offered to the public desirous of using the said railways as a continuous line of communication. *Maidstone Council* v. *Southeastern Railway, etc.*, 7 B. & M., 99.

We now come to an English case decided under the railway and canal traffic act of 1888. This act, as is to be observed from its date, was passed subsequent to the enactment of the act to regulate commerce, in February, 1887. In this case construction is given to section 27 of that act. The head notes in this case are here reported in full, as the decision seems to mark a departure from the limitations as to construction which the commission and the courts had theretofore been under with respect to the undue preference clause of 1854.

Section 27 of the railway and canal traffic act, 1888, enacts that:

Whenever it is shown that any railway company charge one trader or class of traders in any district lower tolls, rates, or charges for the same or similar merchandise, or lower tolls, rates, or charges for the same or similar services, than they charge to other traders, or classes of traders, or to the traders in another district, or make any difference in treatment in

respect of any such trader or traders, the burden of proving that such lower charge or difference in treatment does not amount to an undue preference shall lie on the railway company.

In deciding whether a lower charge or difference in treatment does or does not amount to an undue preference, the court having jurisdiction in the matter, or the commissioners, as the case may be, may, so far as they think reasonable, in addition to any other considerations affecting the case, take into consideration whether such lower charge or difference in treatment is necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant: *Provided*, That no railway company shall make, nor shall the court or the commissioners sanction, any difference in the tolls, rates, or charges made for, or any difference in the treatment of, home and foreign merchandise, in respect of the same or similar services.

The court or the commissioners shall have power to direct that no higher charge shall be made to any person for services in respect of merchandise carried over a less distance than is made to any other person for similar services in respect of the like description and quantity of merchandise carried over a greater distance on the same line of railway.

Semble, that the effect of this section is not to limit the court in dealing with questions of alleged undue preference to the consideration whether or not the lower charge is necessary in the interests of the public.

However difficult it may be in any particular case to say what is or what is not in the interest of the public, the public must be a wider one than that of one of the two localities concerned. (Per Wills, J.)

Upon a complaint under section 7 of the railway and canal traffic act, 1888, by an association of traders in Liverpool against the London and North and Northwestern Railway Company of undue preference in respect of the lower rates charged by them for the carriage of grain and flour from Cardiff to Birmingham, as compared with those charged for the carriage of grain and flour from Liverpool to Birmingham, a shorter distance, it appeared that the trade of the applicants had suffered through the competition in the Birmingham market of grain and flour from the Bristol Channel and Severn ports, but that only a very small quantity was carried by the defendants from Cardiff to Birmingham. The defendants contended that the lower charge was necessary to secure the traffic, first, in their own interests, and, secondly, in the interests of the public. Two other railway companies competed with the defendants between Cardiff and Birmingham, and the lower rates complained of had been fixed with a view to competition by the defendants with the rates charged by other

railway companies from Severn ports, to which grain and flour were brought by sea and which was nearer to Birmingham than Cardiff:

Held, that the interests of the public did not require the maintenance of the low rates from Cardiff to Birmingham, and that such rates were an undue preference.

It is enough to warrant an application under section 7 of the railway and canal traffic act, 1888, calling upon the court for its interference if the practices complained of—whether their present effect be serious or trivial—are in themselves legally objectionable, and if they may lead to consequences legally injurious to the interests of those represented by the applicants. *Liverpool Corn Traders' Association* v. *London and Northwestern Railway Company*, 7 B. & M., 125.

In this opinion Mr. Justice Wills said the defendants carry both from Liverpool and Cardiff to Birmingham, and that the legislature has said to railroad and canal companies, "If you do enjoy the advantage of serving two places, however far apart, *you* must not sacrifice the one set of local interests to the others by undue inequalities in the rates, and so far as *your* contribution to the circumstances under which trades in competing districts are to be carried on are concerned you must be fairly neutral between them, or if you are not you must justify the departure upon grounds legally valid." The court further says: The rates in question have been fixed by the necessity of competing with other means of communication by which grain, flour, etc., find their way, not so much through Cardiff as through the other Bristol channel or Severn ports to Birmingham." The court then goes on to say that if the result of this application should be "that the respondents preferred to redress the inequalities by raising the Cardiff rates, instead of lowering the Liverpool rates, they will probably lose the Cardiff grain and flour traffic, for whatever it may be worth. But it is a very different question whether this state of things justifies the abnormally low rates from Cardiff, and a careful consideration of section 27 of the act of 1888—now to receive for the first time a judicial construction—is necessary." The court further said:

Probably nothing has been alleged against railway companies which has been more bitterly resented by the trading communities than the differential treatment of two different districts by railway companies serving both localities, and it was natural that enlarged facilities for making such complaints should have been given.

In relation to the provisions of section 27, Mr. Justice Wills says:

The provisions of section 27 of the act of 1888, have all the appearance of a compromise. The railway company maintained, of course, that the commercial necessity of competition ought to justify a rate otherwise indefensible. The traders insisted upon the contrary view. The legislature abstained from laying down the principle as contended for by either side and contented itself with the cautious enactment contained in subsection 2 of section 27.

In the present case the learned judge says:

I think that the low charge (from Cardiff) was established not for the purpose of giving a preference but of securing the traffic. That, however, can not be a justification of itself, otherwise there would be no occasion whatever for providing, as the section certainly has done, that something which necessarily includes this particular mode of justification but requires also a great deal more in order to satisfy the words used should be capable of being treated as an element merely of justification. There is no other circumstance that has been pointed out, or can be pointed out, tending to justify it, whilst mileage, routes, necessity of carrying the rates with other companies are all against the low rate.

I therefore have to ask myself whether the preference can be supported, because, first, the company can not raise the Cardiff rate without losing a traffic which, in the interest of the public, ought to be secured; and, second, whether the company can lower the Liverpool rates without "unduly reducing" them. As to the first question, putting the matter in its narrowest aspect, we have only to deal with the traffic of the London and Northwestern Railway Company between Cardiff and Birmingham; but I think it impossible to forget or to throw out of consideration the fact that the London and North Western Railway is only one of three lines which served Cardiff, and that practically the question is, whether the traffic in grain, etc., from Cardiff to Birmingham as a whole ought to be secured in the interests of the public.

After considering what the term "public interest" imports, the learned judge says:

It is, however, as a general rule against the public interests that uncertainty should be introduced into trade by frequent or violent or arbitrary changes of the circumstances under which people engaged in business have to carry it on and to make their living. It is, as a broad general rule, against the public interest that *artificial circumstances*, which at the will or caprice or for the self-interest of any one man or body of men might be swept out of existence, as likely as they were, perhaps, created, should be permitted to interfere with the

natural course of trade. These considerations appear to me to be weighty ones, and to afford broad and safe grounds for saying that it is not necessary in the present case to secure in the interests of the public the Cardiff traffic in question.

Here is a case where low rates from Cardiff, a seaport, to Birmingham were caused, not only from the competition of railway lines from Cardiff to Birmingham, but from competition of grain carried through Severn and Bristol Channel ports and thence by rail to Birmingham, as related to the rail carriage at higher rates of grain for the shorter distance from Liverpool to Birmingham. There was the element of competition in every aspect of the case. There were the fair interests of the railway company to be considered. There was what we call in this country the opportunity for the development of a large trade through Severn and Bristol Channel ports, so much so that the Liverpool traders viewed this growing competition for Birmingham traffic with anxiety and fear. But the proximity of Liverpool to Birmingham in point of distance was held to be controlling, and notwithstanding all the different phases of forceful competition set out in this case it was held that the carriage of grain from Cardiff was not necessary to the public interest at the low rates then prevailing, although a raising of the Cardiff rates would lose the traffic to the company.

(*Liverpool Corn Traders' Association* v. *London and Northwestern Ry. Co.*, 7 B. & M., 125.) See also the second Liverpool Traders' case discussed in addenda hereto.

The case of *Phipps* v. *London and Northwestern Rwy.*, decided in 1892 (2 Q. B., 229), has recently been cited in this country as disposing of the question whether railways are justified in making lower aggregate charges for longer hauls upon the ground of competition while they maintain higher aggregate charges for shorter distances over the same line in the same direction. This decision was rendered more than five years after the interstate-commerce law was passed (1887), and the prime authority for the decision was the English statute of 1888, which *in explicit terms empowered the court or commission to consider whether securing the traffic would be for the public interest*, and also gave railways the right to group rates from different stations, *provided the distances are not unreasonable and no undue preference is created.*

The facts in the case were that Phipps owned iron furnaces at Duston, 60 miles from Great Bridge. There were competing furnaces at Butlins and Islip, situated, respectively, 71 and 82

miles from Great Bridge. Duston depended for railway carriage on the London and Northwestern line, but the other two places were served by both the London and Northwestern and Midland railways. The London and Northwestern charged a lower rate per ton per mile from Butlins and Islip, the longer distance points, than they did from Duston to the same destination—that is, Great Bridge. But the total charge per ton from Duston was 5*s*. 2*d*., while the total charge per ton from Butlins or Islip, the longer distance point, was 5*s*. 8*d*. It thus appears that *while the rate per ton per mile was less the aggregate charges were greater for the longer distances.* The company relied upon the fact of competition with the Midland for justification of its lower rates per ton per mile from the longer distance points.

The plaintiff contended that competition could not be considered by the court at all, but the court held in substance that if the preference was not undue, the railway company was entitled to make a difference in charge on the ground of competition, deciding this point entirely upon the general and indefinite language of the undue preference clause as reenacted by the statute of 1888 and also in the light of sections 27 and 29 of that statute. But it cautiously limited its decision to cases where the differences in charge were not disproportionate or excessive. While Lord Herschel declared that competition was a circumstance which *might* be taken into consideration by the court in a case of alleged undue preference, he was careful to draw a clear distinction between the circumstances which might receive consideration in a case of undue preference simply and in a case under the equality clause of 1845, where the word "circumstances" had been confined as relating to the carriage of goods. Lord Herschel was treating the word "circumstances" in its general sense in a case of undue preference, but he held that the word "circumstances" as employed in the equality clause had a much more limited meaning—that in cases under that clause the circumstances referred only to those under which the goods may be carried. In our second and fourth sections also the "circumstances" are those *under which the transportation is conducted.*

Neither did Lord Herschel by any means decide that the mere presence of competition would be sufficient to *justify* even lower charges per mile in every case. He merely said that it was something which, under the undue preference clause, the court *might* take into account.

Some little confusion is liable to arise over an expression in this case of Phipps that Budd's case is no longer law. But upon careful reading of Lord Herschel's opinion it is clear that his conclusion that Budd's case is no longer an authority refers only to its being an action for overcharges under the undue preference clause of 1854 and as it is reenacted in the statutes of 1873 and 1888. In referring to the case of Budd, his remarks are directed to that portion of the judgment in that case which held that Budd was entitled to recover overcharges collected in excess of those levied for the longer distance. He in no wise attacks the principle laid down in Budd's case, that the greater charge for the shorter distance was unlawful, but he holds, as was first held in the Scotch case of Murray, hereinbefore cited, that an action for moneys had and received will not lie under the undue preference clause of 1854; and this was again held in the case of the *Manchester, etc., Railway Company* v. *Denaby Main Colliery Company* (11 App. Cas., 97).

Even in this case of Phipps, and as was more distinctly set forth in the Liverpool grain traders' case, *ante*, where competition is alleged as justification, *it must affirmatively appear* that the securing of competitive traffic by the particular railway company defendant was necessary to public interest.

Of the use of the word "circumstances" in the equality clause (and it is to the application of the word under this clause that we must turn for authoritative construction by the English court as related to the word in our second and fourth sections), Lord Herschel says, in Phipps' case:

> There are no outside circumstances to be taken into consideration, and it is not a question of regarding the position of one trader as compared with the other, and then saying whether there is any undue preference. *It is an absolute, rigid equality which is demanded by* the statute. Lord Blackburn says it might have been very reasonable, even in this case, to allow other considerations to weigh, but that the legislature has not done so.

Again, he says:

> But under the railway and canal traffic act (1854), as was pointed out in the House of Lords (Denaby case), the company have their option. They may put up one charge; they may put down the other. It is not an equality clause; it is only a clause relating to undue preference or advantage.

(*Phipps* v. *L. & N. W. Ry. Co.*, 2 Q. B., 229; 8 B. & M., 83. See also addenda hereto.)

The case of the *Lancashire and Yorkshire Co.* v. *Greenwood*

(21 Q. B. Div., 215) discusses the right of shippers to recover overcharges under the undue preference clause of 1854, and which is reenacted in succeeding statutes. One reason given by Mr. Justice Cave for the ruling in this case that an action for overcharge will not lie under section 2 of the act of 1854, the undue preference clause, is the language in section 6 of that act, which provides "that no proceeding shall be taken for any violation or contravention of the above enactment except in the manner herein provided." The learned Justice further said that the determination of what constitutes undue preference or prejudice is a matter which is necessarily complicated, "and very unfit indeed to be tried by common jury, to whom the consideration that the charge from A. to B. (for instance) was larger in proportion to the mileage than the charge from B. to C. would present almost irresistible attractions." "I think that one must look at the scope and purpose of the act in order to put the correct interpretation upon section 6, and it appears to me that the object of the legislature here was that this very difficult question, whether there had or had not been an undue preference or an unreasonable disadvantage, was not intended to be left to be fought out before a jury, but was intended to be decided by the special tribunal (the railway commission) thereby appointed, and by that tribunal only." Mr. Justice Cave, in discussing the overcharge case of the Denaby Main Colliery Company, said, in reference to the doubt expressed by the Lord Chancellor in that case, whether any action would lie *expressly* for a breach of the second section of the act (that is for overcharges), that he understood that what the Lord Chancellor desires to reserve for future consideration is "whether, after the decision of the special tribunal (the commission) that there has been a breach of the second section, an action would not lie for extortion founded on the breach established in that way." In such an action Mr. Justice Cave says: "There would be no contest whether there had been a breach or not, because that would have been established by the means provided by the act, and the action would simply be to recover the moneys which by the decision of the special tribunal had been shown to have been extorted by the railway company." The opinion concludes: "I think there is a clearly manifested intention of the legislature that the question whether there has or has not been a breach of the second section is to be tried, not before a jury, but before the special tribunal constituted in the way mentioned in the act, and

having the special powers of inquiring and determining which are given to it by the act."

(*Lancashire and Yorkshire Co.* v. *Greenwood*, 21 Q. B. Div., 215.

Our law expressly allows an award of reparation to the complainant before the commission or the court.

A railway company had in effect on its line grouped rates to and from stations situate 18, 27, 28 and 38 miles, respectively, from a common junction. The works at these stations obtained iron ore and coke from the same sources, made the same description of pig iron, and sent it to the same markets. There was a uniform rate of carriage, except that the applicants, who were 18 miles from the railway junction, were charged 6*d.* a ton less than the owners of the other works in respect of the coke. *Held*, that there was sufficient allowance made for the difference in distance between the works in regard to the rate on coke, but as regards the pig iron rate some of the places grouped together were at such distances apart as to create an undue preference. *North Lonsdale Iron and Steel Company* v. *Furness Railway Company, etc.*, 7 B. & M., 146.

Upon a complaint that the railway company did not give the merchants or traders of Newry the benefit of the geographical position of the town with regard to Belfast and the several towns lying west and northwest of Newry, and that the railway company gave a preference to the merchants or traders of the said towns to send or bring their goods to and from Belfast at much lower rates than they did for the merchants of Newry, although the town of Newry was much nearer them than Belfast. *Held*, that the rates complained of did not sufficiently take into account the difference of distance in favor of Newry and amounted to an undue preference of Belfast over Newry. *Town Commissioners of Newry* v. *Great Northern Railway Company*, 7 B. & M., 184.

This was a case of longer and shorter distances by the same system. In concluding his opinion Mr. Justice Murphy said:

Having regard to the keen competition in trade and to the serious burdens that may be imposed upon traders by apparently small increase in charges for carriage, in all cases where inequality of rates is shown, we must be very careful in examining the facts that are put forward as justifying this inequality.

The company, under the order of the commissioners, made the same scale of rates for Newry as they did for Belfast; but in addition to the Newry scale they added from 2*d.* to 4*d.*, according to the class, for increased cost of working the line between Newry and Armagh, it being shown in the first case that that line abounded in bad gradients and steep inclines. The commissioners held, upon application for an order for penalties against the defendants, on the ground that they had not obeyed the order of the court, that on account of the increased cost of carriage between Newry and Armagh, the addition of 2*d.* to 4*d.* made by the railway company was not unreasonable for that portion of the line.

ADDENDA.

The official report of the case of *Phipps* v. *L. & N. W. Ry. Co.* having come to hand, it seems important to present a fuller analysis of the decision than was practicable when this pamphlet was first printed. In addition to the discussion on pages 72–74, the following is submitted:

The Phipps Case.—The scope of this case is not thoroughly understood. It is quoted, on behalf of the carriers, in the arguments in the Social Circle Case, as justifying their contention that competition creates a dissimilarity of circumstances and conditions. The point in the Phipps Case was whether or not the railway company had given to the competitors of complainant a preference which was undue. The point in the Social Circle Case is whether the carriers have violated a rule of the American statute which in terms prohibits greater charges for shorter than for longer distances when carrying traffic under substantially similar circumstances and conditions. In the Social Circle Case the circumstances and conditions to be considered are, by the terms of the statute, those under which the transportation was conducted. In the Phipps Case the matters for consideration were those which would enable the court to determine whether the company had in any manner given, not a preference merely, but a preference which was undue.

In the Phipps Case the complainant rested upon the contention that he was entitled to the mileage rate allowed to his competitors whose plants were situated at a *longer distance* from the market. He did not seek the same total rates for a short as for a long haul; he already had a lower total rate than was given to his competitors at Butlins and Islip, the longer distance points. What he wanted was a rate *per mile* as low as that which was accorded to Butlins and Islip, and this would have given him a total rate still lower than those from

Butlins and Islip, and still lower than that which he already enjoyed. The theory of equal mileage rates for shorter and longer distances does not apply at all in this country. The rule of the fourth section of our act is limited to aggregate charges. It does not involve any consideration of mileage rates whatsoever. It deals altogether with total charges to the shorter and longer distance points.

Lord Herschell, in deciding the Phipps Case, distinctly indicates that the reasoning in that case would not be applicable to a complaint of greater total charges for shorter than for longer distances. In doing this he used for illustration the case of *Budd* v. *London and Northwestern Railway Company*, 4 B. & M., 393:

> The plaintiffs' works were situated on the defendants' railway at a point nearer the market by some miles than certain other works which were within a 6-mile radius of Swansea. The railway company charged for the carriage of goods from works within the 6-mile radius of Swansea *less actually* than they did from the plaintiffs' works, although they were carried over the same line, and therefore, coming from a point farther from the point of destination than the plaintiffs, passed over the whole journey which was made by the plaintiffs' goods. This was defended on the ground that in the neighborhood of Swansea there was *competition by the sea route*, and that was the explanation of the lower charge. It may be doubted whether, *even if competition could be properly taken into account*, the action of the defendants there was capable of justification, because the charge made was actually smaller than the charge made to the plaintiff.

This is clear indication that Lord Herschell did not mean to imply by his reasoning in the Phipps Case that competition could be considered in a case involving a greater total charge for a shorter than for a longer distance over the same rails, and that he thought the case of Budd, so far as it prohibited the greater total charge for the shorter distance, was correctly decided. Indeed, in further commenting upon the Budd Case, he says:

> Now, inasmuch as they carried not only from a point beyond that from which they carried the plaintiffs' goods, but carried the goods of these other traders over exactly that piece of line over which they carried for the plaintiff and yet made a smaller charge, it was difficult to say the equality clause—that is to say, section 90 of the railway clauses consolidation act of 1845—was not infringed. It is obvious they might say they were carrying for nothing from a point beyond the

plaintiffs' works, but inasmuch as they carried over that same piece of line and only charged 11s. 9d. in the one case and 12s. in the other, it would have been, I think, very likely difficult to answer a charge of breach of that statutory provision.

This section 90 of the act of 1845 is *the one* which contains the words "passing only over the same portion of the line of railway *under the same circumstances*." Lord Herschell's criticism of the Budd Case, and his statement that as a decision it is no longer law, applies merely to the point that Budd was given a judgment for overcharges under section 2 of the act of 1854—the undue preference clause. It was held in the Phipps Case, citing the Denaby Main Case, that no such action for overcharges will lie under the undue preference clause, that a broad distinction must be drawn between what is known as the equality clause in the act of 1845 and the undue preference clause of the act of 1854. In other words, that the equality clause, like our second and fourth sections, prescribes a definite rule of conduct, while the undue preference clause involves a question of fact as to whether the preference was or was not undue.

A careful reading of this Phipps Case will show that the cases of Budd, Denaby Main Colliery Co., and Evershed were considered and distinguished for the purpose of reaffirming the decision that a complainant could not obtain a money judgment for a breach of the undue preference clause. Evershed's Case was based on the equality clause of 1845, and what was said by Lord Blackburn in that case is quoted approvingly by Lord Herschell in the Phipps Case: "The words of the equality clause have no elasticity at all; there are no *outside circumstances* to be taken into consideration, and it is not a question of regarding the position of the one trader as against the other, and then saying whether there is any undue preference." So with the second and fourth sections of our act; no outside circumstances are to be taken into account.

But this decision in the case of Phipps rests altogether upon an amendment inserted in the English act of 1888, after the Act to regulate commerce was passed. This amendment (see Sub. 2, Sec. 27, English act of 1888) is :

In deciding whether a lower charge or difference in treatment does or does not amount to an undue preference, the court having jurisdiction in the matter, or the commissioners, as the case may be, may, so far as they think reasonable, in

addition to any other circumstances affecting the case, take into consideration whether such lower charge or difference in treatment is necessary for the purpose of securing in the interest of the public the traffic in respect of which it is made, and whether the inequality can not be removed without unduly reducing the rates charged to the complainant.

By this amendment the court is given permission, under the statute, to consider certain outside circumstances in cases of undue preference, and Lord Herschell, in deciding the Phipps Case, considered competition as one of the outside circumstances included in such permission. The act to regulate commerce contains no such permission, other than to the Interstate Commerce Commission in considering special cases under section four. (*Phipps* v. *London and Northwestern Ry. Co.*, B. & M., 83.)

The Liverpool Corn Traders' Association Case (No. 2).—In the foregoing analysis of English cases, which was submitted to the court of appeals as part of the brief on behalf of the commission in the Social Circle Case, the first Liverpool Corn Traders' Association Case is discussed on pages 68–72, and it is there stated that the case was brought under the above-mentioned amendment in the English act of 1888. (Sub. 2, sec. 27.) That was not a case of greater charges for shorter than for longer distances over the same connected line of rails. Liverpool complained of rates to Birmingham as related to rates from Cardiff to Birmingham. Liverpool traffic approached Birmingham in a southeasterly direction, while Cardiff traffic was carried to Birmingham over a northeasterly course. So the case was simply one of relative rates on traffic from points in different sections to a common market. The Liverpool Corn Traders' Association prevailed on that application, which was against the London and Northwestern Railway.

The same association subsequently complained before the Railway Commissioners against the Great Western Railway Company of undue preference given by that company to Cardiff and other Severn ports as against rates from Birkenhead, a point on the river Mersey opposite Liverpool and taking rates applicable to the whole port of Liverpool. In this case the Liverpool traders failed because it was shown that the Liverpool traders were able, notwithstanding the difference in rates complained of, to compete effectively in Birmingham and other

Midland markets with the traders who sent grain traffic from the western ports, such as Cardiff and other places on the Severn; and further because the existing inequality in rates must be maintained if the Midland markets were to have the benefit of both sources of supply.

But this case, like that of Phipps, was also decided under the undue-preference clause of the English statute in connection with the permission to consider outside circumstances as set forth in subdivision 2 of sec. 27 of the English act of 1888.

The effect of this subdivision 2 of sec. 27 upon the decision is shown by the following language taken from the opinion of Lord Esher of the court of appeal in this second Liverpool Corn Traders' Case: "We had to take into consideration under the former act certain things, and to determine upon those considerations, and upon those only. The legislature has thought that we might want, in certain cases, to take into consideration other matters, and, therefore, in this subsection they have said that we may take into consideration certain other matters." (*Liverpool Corn Traders' Association* v. *Great Western Ry. Co.*, 8 B. & M., 114.)

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